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Prosecutorial Misconduct in Grand Jury Investigations

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PROSECUTORIAL MISCONDUCT IN GRAND JURY INVESTIGATIONS

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I. INTRODUCTION

Among the compelling aspects of the Independent Counsel's investigation of President Clinton's tawdry conduct was his appearance before a federal grand jury and the subsequent release of that testimony to the public. For one of the few times in American history, actual grand jury proceedings were exposed to the general public. Subsequently, the grand jury—an institution

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sheathed in secrecy with roots traceable to twelfth century England[1]—became the focal point of the heavily criticized investigation of the President's conduct. That criticism centered largely on the tactics employed by members of the Independent Counsel's office in gathering information and calling witnesses before the grand jury.[2] For example, the extensive grand jury examination of Marcia Lewis, Monica Lewinsky's mother, triggered widespread disapproval of the Independent Counsel's tactics[3] and even prompted legislative proposals to protect communications between parents and children.[4] Yet, the grand jury investigation led by the Independent Counsel did not violate the constitutional rights of any witnesses, even if the tactics appeared high-handed and the reason for the inquiry politically motivated.

While the grand jury was the centerpiece of the Independent Counsel's investigation, the prosecutor's role in leading this body was its true focal point. The inquiry into the President's conduct demonstrated the primacy of the prosecutor in guiding the grand jury. This role is crucial because, at the federal level, the grand jury is frequently the principal means of investigating white collar crimes arising out of economic activity or personal relationships among the participants. The federal grand jury's power to investigate crimes is broad because it is entitled to "every man's evidence."[5] The Supreme Court has described the scope of the grand jury's authority as the power to "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."[6] It carries out this investigative function through the authority to issue subpoenas that compel the production of evidence and the

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1. The origins of the American grand jury came from the establishment of the Assize of Clarendon by King Henry II in 1166. *See* SIR FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 151-152 (2d ed. 1968). For a review of the history of the grand jury, see Mark Kadish, *Behind the Locked Doors of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U.L.REV. 1, 1-22 (1996); Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 707-10 (1972); Fred A. Bernstein, Note, *Behind the Gray Door*: Williams, *Secrecy, and the Federal Grand Jury*, 69 N.Y.U.L.REV. 563, 574-83 (1994); Susan M. Schiappa, Note, *Preserving the Autonomy and Function of the Grand Jury*: United States v. Williams, 43 CATH. U. L. REV. 311, 324-28 (1993).

2. *See, e.g.*, Richard Ben-Veniste, *Comparisons Can be Odious, Mr. Starr*, NAT'L L.J., Dec. 21, 1998, at A21 ("[T]he aggressive and disproportionate tactics employed by Mr. Starr's office, often in violation of Department of Justice guidelines and bar association standards of professional responsibility, have left the public with the justifiable perception that Mr. Starr is conducting a crusade rather than an investigation . . . .").

3. *See* Myriam Marquez, Editorial, *How Would You Feel If Your Daughter Got Stuck in Starr's Web?*, ORLANDO SENTINEL, Feb. 23, 1998, at A10, *available in* 1998 WL5331740; Editorial, *A Mother Testifies*, INDIANAPOLIS STAR, Feb. 25, 1998, at A14, *available in* 1998 WL 8315952; Editorial, *Calling Mother to Testify an Invasion of Privacy*, PORTLAND OREGONIAN, Feb. 25, 1998, at E11, *available in* 1998 WL 4185429; Editorial, *Pushing the Envelope: Starr's Zeal May Undercut His Public Support*, NEWSDAY, Feb. 15, 1998, at B1, *available in* 1998 WL 2658701.

4. *See* S. 1721, 105th Cong. § 1 (1998); H.R. 3577, 105th Cong. (1998).

5. Branzburg v. Hayes, 408 U.S. 665, 688 (1972).

6. United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950).

testimony of witnesses.[7]

The grand jury is more than just a vehicle for gathering evidence; it also has an accusatory function. For federal crimes the Constitution provides that, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."[8] These two functions are, upon reflection, quite different. As an investigative body, the grand jury may gather evidence simply to assure itself that no crime has taken place. No real limitations are imposed on its authority to investigate wrongdoing, except for the privileges an individual witness may assert to resist responding to questions.[9] However, upon completion of an investigation, whether conducted through the auspices of the grand jury itself or by a police agency, the grand jury must adopt a neutral stance to determine whether there is sufficient evidence to indict a person. Thus at the accusatory stage, the Supreme Court has described the grand jury's role as "protecting citizens against unfounded criminal prosecutions,"[10] and noted that "this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution . . . ."[11] The grand jury's character shifts from gathering evidence of criminality to judging the weight of that evidence and determining whether to initiate a criminal prosecution.

While the grand jury is an independent body, it is misleading to consider it a self-governing investigatory institution because the prosecutor actually controls the process of the investigation and the presentation of evidence to the grand jurors. Technically, the grand jury operates separately from both the courts and the executive. In fact, however, the prosecutor is closely involved in and usually controls the grand jury's operation by sending out subpoenas, reviewing records, deciding which witnesses will testify before the grand jurors, and ultimately drafting indictments for the grand jury's approval.[12] The Supreme Court has recognized the prosecutor's leading role in the proceedings, noting that the prosecutor does not "require leave of court to seek a grand jury indictment. And in its day-to-day functioning, the grand jury generally operates

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7. *See* United States v. R. Enterprises, 498 U.S. 292, 297 (1991) ("The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush."); United States v. Calandra, 414 U.S. 338, 343 (1974) ("The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate. . . ."). The Supreme Court has traced the grand jury's authority to compel witnesses to appear back to at least 1612 in England. *See* Blair v. United States, 250 U.S. 273, 279-80 (1919).

8. U.S. CONST. amend. V.

9. *See Branzburg*, 408 U.S. at 688 (stating that the grand jury has a "'right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege.").

10. *Id.* at 686-87.

11. Wood v. Georgia, 370 U.S. 375, 390 (1962).

12. *See* Ron S. Chun, *The Right to Grand Jury Indictment*, 26 AM. CRIM. L. REV. 1457, 1474 (1989).

without the interference of a presiding judge."[13]

Unlike police investigations, the Fourth Amendment does not constrain the grand jury's inquiry because its subpoenas are not a "seizure" subject to the Constitution's reasonableness requirement.[14] Moreover, targets of an investigation have no right to testify before the grand jury or to compel the prosecutor to present exculpatory evidence.[15] Aside from the privileges any witness may assert, such as the Fifth Amendment privilege against self-incrimination, no explicit constitutional protections are afforded grand jury targets prior to their indictment. Thus prosecutors are largely free from direct constitutional limitation on their investigative authority and through the grand jury can compel witnesses to appear and produce evidence. At the accusatory stage, the prosecutor drafts the indictment for the grand jury's consideration, serves as the body's legal adviser regarding the elements of the crime, and signs the indictment after the grand jurors vote to approve it.[16] In short, the prosecutor's actions in directing the course of an investigation are largely free from judicial oversight. With that authority comes the possibility that prosecutors will abuse the privilege by engaging in misconduct in the course of a grand jury proceeding.

There has been sustained criticism of the current operation of the grand jury system. This criticism centers mainly on the prosecutor's control over the process and the grand jury's concomitant lack of independence.[17] For example, Justice Douglas claimed in a dissenting opinion that it was "common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive."[18] Professor Peter Arenella similarly assailed "the grand jury's present tendency to rubber-stamp the prosecutor's decisions,"[19] while a senior federal district court judge asserted that "the grand jury is the total captive of the prosecutor . . . ."[20] The

13. United States v. Williams, 504 U.S. 36, 48 (1992).

14. United States v. Dionisio, 410 U.S. 1, 9 (1973).

15. *See Williams*, 504 U.S. at 53 ("If the grand jury has no obligation to consider all 'substantial exculpatory' evidence, we do not understand how the prosecutor can be said to have a binding obligation to present it."). Every witness before a grand jury retains the Fifth Amendment privilege against self-incrimination. Additionally, other evidentiary privileges, such as the attorney-client and spousal privileges, may be invoked by a witness who refuses to respond to questioning. However, the government is not required to provide *Miranda* warnings to a witness regarding the right to invoke the privilege against self-incrimination. *See* United States v. Mandujano, 425 U.S. 564, 582-84 (1976) (Burger, C.J., plurality opinion).

16. FED. R. CRIM. P. 7(c)(1); *see* United States v. Cox, 342 F.2d 167, 171-72 (5th Cir. 1965) (stating signature of United States Attorney is required for valid indictment).

17. *See generally* Wayne L. Morse, *A Survey of the Grand Jury System*, 10 OR. L. REV. 101, 101 (1931) (noting the criticism that the grand jury was "merely a rubber stamp for the district attorney").

18. United States v. Mara, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting).

19. Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 474 (1980).

20. William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 174 (1973).

perhaps overwrought assessment of some student authors has been to call the grand jury "a prosecution lapdog"[21] and "an ignominious prosecutorial puppet."[22] A recent proposal from the defense bar to reform the grand jury process relies primarily on requiring the prosecutor to present certain evidence, including the testimony of a target of the investigation, and mandating greater participation by counsel for witnesses called to testify before the grand jury.[23]

An oft-cited basis for criticizing prosecutorial misuse of the grand jury is the frequency with which it approves indictments proposed by the government—often over ninety-nine percent of the time.[24] Based on this statistical premise, commentators infer that the grand jury cannot be acting independently of the prosecutor; otherwise, it would not indict all of the cases proposed by the government.[25] However, Professor Andrew Leipold has quite effectively criticized this facile conclusion, arguing that "even brief reflection shows how unhelpful these figures are. That grand juries nearly always return true bills may indeed demonstrate that jurors simply approve whatever charges the government submits, but it could also show that grand juries are a great

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21. Judith M. Beall, Note, *What Do You Do with a Runaway Grand Jury?: A Discussion of the Problems and Possibilities Opened Up by the Rocky Flats Grand Jury Investigation*, 71 S. CAL. L. REV. 617, 629 (1998).

22. Bernstein, *supra* note 1, at 563-64; *see also* Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 73 (1995) (discussing "federal grand juries' subservience to prosecutors"); Schiappa, *supra* note 1, at 349 (opining that "[M]odern exigencies have shifted the balance of power in the grand jury room and have allowed the prosecutor to assume a position of unprecedented influence.").

23. *See* Frederick P. Hafetz & John M. Pellettieri, *Time to Reform the Grand Jury*, THE CHAMPION, Jan.-Feb. 1999, at 12, 14-15, 63; *see also* Sam Skolnik, *Grand Juries: Power Shift? Lawmaker's Vow to Give Defendants Clout is Likely to Draw Heat*, LEGAL TIMES, Apr. 12, 1999, at 1 (discussing a bill by Representative Delahunt along the same lines and its opposition by the Justice Department).

24. *See* Beall, *supra* note 21, at 631 ("That dependence is proven by the inclination of federal grand juries to go along with the wishes of the federal prosecutor. In 1984, for example, federal grand juries returned indictments in 99.6% of all cases presented to them."); *see also* Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 274 (1995) (citing the same statistic). Recent reports suggest that the current grand jury indictment rate is equally high. *See* Skolnik, *supra* note 23, at 16.

25. For example, one author cites the experience of an Assistant United States Attorney indicting fifteen defendants in only forty-five minutes as an example of the transformation of the grand jury into the prosecutor's "playtoy." Bernstein, *supra* note 1, at 573 nn.55-56. However, the prosecutor's alacrity in presenting cases to the grand jury is irrelevant in determining whether there was any misconduct during the investigation or whether the grand jury had sufficient evidence to find probable cause of wrongdoing. The example presented above involved indictments of drug "mules" whose sole crime, it appears, was possession or transportation of illegal narcotics. Surely it is not surprising that little evidence beyond an agent's testimony would be required to find probable cause, especially if all the defendants' illegal conduct involved the same means of transporting the drugs, or they were all arrested at the same location, such as an airport or border crossing. Thus, beyond the incident's rhetorical appeal, the example provides no indications of misuse of the grand jury or misconduct by the prosecutor.

success."[26] He notes that "there would be cause for concern if grand juries *refused* to indict in a high percentage of cases."[27]

The assumption of the grand jury's critics is that prosecutorial control of the accusatory process must be harmful to the rights of defendants. However, these critics fail to marshal without any direct proof that the grand jury would have acted differently had the prosecutor exercised less control over the indictment. Certainly, the indictment rate is alluring anecdotal evidence that, somehow, prosecutors must be abusing the rights of defendants by having the grand jury indict cases in which the charges should not be filed. The problem with inferring prosecutorial misconduct from the high indictment rate, however, is that the data says nothing about whether—or how—prosecutors are misusing their authority in guiding, even controlling, the grand jury *investigation*. The statistics provide no basis to assert that, because grand juries approve a high number of indictments sought by prosecutors, there must be significant instances of prosecutorial misconduct in the grand jury's investigative process. That process is the real point at which prosecutorial misconduct can affect a potential defendant.

Even if the criticisms of the grand jury's accusatory role were valid, the alternative would be to allow the prosecutor's office to file charges on its own authority with no outside involvement in the decision whether to accuse a person of committing a crime. Because the Supreme Court has not imposed the grand jury requirement on the states,[28] a number of jurisdictions take this approach. Those states permit prosecutors to accuse people of crimes and leave the probable cause determination to a preliminary "bindover" hearing before a magistrate at a later time.[29] This approach recognizes that the best means of controlling prosecutorial misconduct during a grand jury investigation cannot lie in abrogating or limiting the grand jury's role in deciding whether to approve an indictment—the harm has already taken place. Thus, the "rubber stamp" criticism of the grand jury's accusatory function is misguided because it does not address the stage at which prosecutorial misconduct is most likely to occur.

Disapproval of the grand jury should be directed instead toward prosecutorial abuse in the investigatory process, and the focus should be on evaluating ways to discourage prosecutors from engaging in misconduct. One

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26. Leipold, *supra* note 24, at 275.

27. *Id.* at 276. One prosecutor has stated: "It would concern me if there were a high number of no true bills. If anything, I think the statistics show that prosecutors are being prudent in who they are selecting to go before a grand jury." *See* Skolnik, *supra* note 23, at 16 (quoting James K. Robinson, Assistant Attorney General for the Criminal Division, United States Department of Justice).

28. Hurtado v. California, 110 U.S. 516, 538 (1884).

29. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE §14.2(d) (2d ed. 1992) (noting that two-thirds of the states permit prosecution for serious offenses by information filed by the prosecutor, and "a preliminary hearing bindover (or defense waiver) is a prerequisite for prosecution by information.").

method of policing prosecutorial misconduct during the investigative phase would be to rely on the courts to monitor grand jury proceedings more closely. However, the Supreme Court has placed the prosecutor's conduct before the grand jury almost completely off-limits to any contemporaneous judicial review. A defendant cannot challenge prosecutorial conduct during a grand jury investigation by seeking to have an indictment dismissed or evidence excluded from trial.[30] Moreover, the Court has placed indictments beyond the reach of judicial review[31] and stripped the lower courts of any presumed authority to create and enforce rules of prosecutorial conduct during grand jury investigations.[32] Indeed, the Court has even removed the threat of monetary sanctions for violating a defendant's constitutional rights by interposing the shield of absolute immunity for prosecutorial conduct before the grand jury.[33]

My thesis is that the Supreme Court has made the grand jury, and the prosecutors that guide its proceedings, free from judicial oversight in order to protect the investigative function from outside interference. That function, more than the accusatory function, defines the importance of the grand jury in the criminal justice system. As the Court has noted, "The scope of the grand jury's powers reflects its special role in insuring fair and effective law enforcement . . . . The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged."[34] The grand jury serves a special role in the investigation of crime, especially white collar crimes in which the authority and presence of a grand jury are the best means of ferreting out information.[35] Because of the grand jury's broad authority to investigate crime, the Court does not want judges interfering with, and possibly exerting control over, the investigative process. Absent congressional action to expand the rights of individuals in a grand jury investigation,[36] the Court has refused

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30. *See infra* notes 43-50, 80-95 and accompanying text.

31. *See id.*

32. *See infra* notes 106-14 and accompanying text.

33. *See infra* notes 199-200 and accompanying text.

34. United States v. Calandra, 414 U.S. 338, 343-44 (1974).

35. *See* Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 AM. CRIM. L. REV. 339, 344-45 (1999) ("It is also not surprising that the greatest use of grand juries as investigative tools is in the white collar area, where potential witnesses frequently operate within an institutional context that both requires the threat of legal sanction as a means of obtaining testimony, and takes that threat seriously."). Professor Richman notes that most federal felony cases, which require a grand jury indictment, involve little or no grand jury involvement in the investigation, which "will have been conducted by a law enforcement agency without the assistance of a prosecutor, to whom the case will be presented only when the agency cannot go further on its own." *Id.* at 343. White collar, organized crime and major drug smuggling investigations, on the other hand, often require the use of the grand jury's coercive authority to proceed. *Id.* In those types of cases, the grand jury is likely to have a moderating effect on the prosecutor.

36. *See* Skolnik, *supra* note 23, at 1, 16 (reporting on possible legislation that "would allow witnesses' lawyers into the grand jury room, mandate that prosecutors turn over significant exculpatory evidence to the grand jury, and prohibit prosecutors from introducing evidence to a grand jury that would be deemed illegal at a trial.").

to permit judges to exercise what it has termed a "chancellor's foot veto" that would allow second-guessing of the methods prosecutors use to gather evidence and examine witnesses appearing before grand jurors.[37] The Court's approach has been to prohibit defendants from challenging the prosecutor's conduct of the grand jury investigation because such challenges would provide a means to delay criminal proceedings by tying up the government's resources in defending its investigation. The Court relies on the criminal trial to vindicate a defendant's rights; thus a decision on the core issue of the defendant's guilt or innocence should be the focus of the criminal process, not the prosecutor's conduct.

To insulate the grand jury's investigative function from judicial review, the Court has rejected arguments that would diminish the authority of the grand jury by imposing limitations akin to those imposed by the Fourth Amendment; indeed, the Court has explicitly rejected the notion of importing the protections afforded suspects in police searches and interrogations to grand jury investigations.[38] Protecting the grand jury by abjuring limitations on its investigative authority inevitably means protecting the prosecutors that direct the investigation from judicial review. Given the Court's approach, efforts to control prosecutorial misconduct during a grand jury investigation must come outside of the grand jury system itself and the criminal prosecution spawned by the proceedings in which the misconduct allegedly occurred.

This Article analyzes how the Court has blunted numerous efforts by defendants to challenge the actions of prosecutors in the grand jury. The Court's approach to the prosecutor's actions in grand jury investigations has effectively made that conduct unreviewable by lower courts. In light of that approach, criticism of the grand jury system based on the prosecutor's domination of the process overlooks the degree to which the Court has accepted, and even encouraged, prosecutorial control of grand jury investigations. Thus, assertions that the grand jury's accusatory role has devolved into a rubber stamp of the prosecutor are, in a sense, exactly the point. The Court guards the grand jury's independence from judicial control in order to protect its prosecutor-dominated investigative function. In the Court's view, this function is more important than the accusatory function to the effective operation of the criminal justice system. To that end, the Supreme Court has rejected efforts that would allow, or worse encourage, courts to adopt rules impinging on the grand jury's investigative function or the prosecutor's role in directing the investigation.

Does that mean prosecutorial misconduct during a grand jury investigation is wholly beyond judicial review? Just because prosecutorial misconduct before the grand jury cannot be challenged in the context of the particular criminal

37. *See* United States v. Russell, 411 U.S. 423, 435 (1973) ("[The entrapment defense] was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve.").

38. *Id.* at 436.

prosecution in which it occurred does not mean that alternative avenues are—or should be—unavailable. However, the authority to monitor prosecutorial conduct before the grand jury rests with the legislature, not the courts. A recent congressional enactment, the Hyde Amendment,[39] points the way to what this Author concludes is the proper means of policing prosecutorial misconduct in the grand jury. This provision, adopted in 1997, permits a defendant exonerated of federal criminal charges to seek attorney's fees if he can prove the government's decision to file charges was "vexatious, frivolous or in bad faith . . . ."[40] The Hyde Amendment makes prosecutorial misconduct the principal issue in a claim for attorney's fees, requiring courts to review the government's conduct as far back as the earliest stages of a case, including the grand jury investigation. With the power of judicial hindsight to assess the propriety of the government's conduct, the Hyde Amendment gives courts a means to police prosecutorial misconduct without interfering with the grand jury's investigation or the conduct of a criminal prosecution.

Part II of the Article reviews the Supreme Court's approach to judicial control of investigations through the exercise of a court's supervisory power. The Court was initially receptive to imposing limitations on investigative tactics through this presumed authority of courts to monitor judicial proceedings. Once the lower courts began to impose rules on prosecutors conducting grand jury investigations, however, the Court reacted by severely curtailing this method of creating rules for how prosecutors could operate before the grand jury. Part III considers another type of prosecutorial misconduct before the grand jury called the "perjury trap" and discusses its origins in two related doctrines: the entrapment defense and the outrageous government conduct doctrine. This Part argues that the extension of these doctrines—both of which limit the government's ability to "create" crimes by implanting a criminal idea in the mind of an "unwary innocent" or otherwise engage in tactics considered repulsive or unconscionable—are inapplicable to the conduct of prosecutors in the grand jury examining a perjurious witness. This Part then considers the Fifth Amendment grand jury right as a possible means of controlling prosecutorial conduct in the grand jury and concludes that it cannot provide a way of avoiding the Court's limitations on judicial authority to review a grand jury's investigation or indictment.

Having shown that virtually all prosecutorial conduct in the grand jury is off-limits to direct judicial review, Part IV looks at two laws adopted recently by Congress to address prosecutorial misconduct. The first is the Hyde Amendment. This Amendment authorizes a vindicated defendant to seek recovery of attorney's fees if the defendant can show the government's position was "vexatious, frivolous, or in bad faith."[41] The second is the McDade Act.

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39. Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (to be codified at 18 U.S.C. 3006A).

40. *Id.*

41. *Id.*

This law makes federal prosecutors subject to the disciplinary rules of the states in which they undertake any activities in a case.[42] In both instances, Congress adopted the provisions as a means to control prosecutorial misconduct through separate proceedings distinct from the underlying criminal prosecution. In conclusion, this Article argues that while these laws may have their defects, they are nonetheless consistent with the Supreme Court's rejection of defense challenges during a pending criminal prosecution. Moreover, both laws begin to provide a means of addressing the problem of prosecutorial misconduct consistent with the grand jury's broad authority to investigate wrongdoing.

II. THE DEMISE OF JUDICIAL CONTROL OVER INVESTIGATIONS

The Fifth Amendment provides that a defendant charged with a capital "or otherwise infamous crime" shall be charged in an indictment returned by a grand jury.[43] In *Costello v. United States*,[44] the Court rejected the argument that an indictment based solely on hearsay evidence, presumably inadmissible at trial, violated the defendant's right to a grand jury indictment.[45] The Court stated that "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act."[46] The Fifth Amendment right requires that a grand jury actually indict the defendant, but does not prescribe what types of evidence the grand jury may consider in determining whether there is probable cause to indict.[47] Therefore, "[a]n indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits."[48]

Costello ruled out any substantive judicial review of the sufficiency of the evidence considered by the grand jury, effectively requiring a defendant to go to trial to challenge the government's case. *Costello* conclusively established that the grand jury's exercise of its accusatory function was not subject to

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42. Publ. L. No. 105-277, § 801, 112 Stat. 2681 (1998) (to be codified at 28 U.S.C. § 530B).

43. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury"). The Supreme Court defines an "infamous crime" as one involving a punishment of hard labor, *Ex parte* Wilson, 114 U.S. 417, 429 (1885), or a term of imprisonment in a penitentiary, Mackin v. United States, 117 U.S. 348, 352 (1886). The grand jury right is one of two criminal protections in the Bill of Rights not applicable to the states, the other being the Eighth Amendment's prohibition on excessive bail. *See* Hurtado v. California, 110 U.S. 516, 538 (1884) (permitting substitution of an information for grand jury indictment).

44. 350 U.S. 359 (1956).

45. *Id.* at 361, 363.

46. *Id.* at 362. The defendant objected to the government's reliance on the summary testimony of three investigative agents who reported the evidence of defendant's tax evasion to the grand jury given that, at trial, the prosecution had to call 144 witnesses and introduce 368 exhibits to prove its case. *Id.* at 360.

47. *Id.* at 362.

48. *Id.* at 363.

judicial review except through the continuation of the criminal process in a trial. While *Costello* ostensibly protected the accusatory function, the Supreme Court's rationale shows that its greater concern was to protect the investigatory function from judicial scrutiny. The Court noted that imposing the requirements of the evidence rules would introduce unnecessary formality into the process "in which laymen conduct their inquiries unfettered by technical rules."[49] The Court was not so much concerned about the adequacy of the grand jury's evidence as it was with a defendant's attempt to interfere with the investigation by demanding that the trial court review how the prosecutor chose to bring the evidence before the grand jury.

Costello involved a typical white collar crime, tax evasion, that usually involves a prosecutor leading a grand jury investigation by subpoenaing records. The defendant's challenge was not about whether the grand jury had probable cause—it certainly appears that it did, and the defendant never contested it—or about the methods used to obtain the documentary evidence. Rather, the defendant contested how the government presented the fruits of its investigation to the grand jury. The Court prohibited the defendant from using a challenge to the validity of the indictment as a means of questioning the conduct of the investigation because "the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury."[50] *Costello* limits a court's authority to review the conduct of an investigation under the guise of a challenge to the sufficiency of the evidence considered by the grand jury.

While *Costello* foreclosed judicial review of the grand jury's accusatory function based on the quality of evidence, a question remained: could a defendant challenge a prosecutor's conduct in the grand jury without challenging the sufficiency of evidence presented to secure the indictment?

A. Development of the Supervisory Power Doctrine

Aside from those explicit constitutional constraints on the government enforced by the judiciary, courts have an inherent authority to control their own proceedings. If that supervisory authority extends to conduct outside of the courtroom that affects judicial proceedings, then the judiciary can assert a greater measure of control over the actions of prosecutors and investigators without having to rely on any express constitutional provision or statute.[51]

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49. *Id.* at 364.

50. *Id.* at 363.

51. Professor Bloom has described a court's supervisory power as giving "judges considerable leeway within the federal court system to rectify procedures or executive actions that they find inherently wrong even though such procedures and actions may not violate constitutional or statutory provisions." Robert M. Bloom, *Judicial Integrity: A Call for Its Re-*

McNabb v. United States[52] ratified this theory. *McNabb* was the first instance in which the Supreme Court relied on the doctrine of inherent judicial authority to supervise the government's conduct by excluding evidence obtained in a questionable, but not otherwise illegal, fashion.[53]

The Court reviewed the convictions of three members of the McNabb clan, each of whom had been convicted of murdering a federal agent. Investigators extracted confessions from the defendants using "third degree" techniques that included holding the suspects incommunicado overnight and subjecting them to repeated questioning.[54] The confessions were "the crux of the Government's case," and the defendants argued that the prolonged questioning constituted a violation of the Fifth Amendment privilege against self-incrimination.[55] The Court did not reach the Fifth Amendment argument, but found that "[j]udicial supervision of the administration of criminal justice . . . implies the duty of establishing and maintaining civilized standards of procedure and evidence."[56] Based on this nonconstitutional supervisory authority, the Court held that evidence obtained by questioning the defendants before they were brought before a commissioner or judicial officer could not be admitted, even though "Congress has not explicitly forbidden the use of evidence so procured."[57] The Court rationalized granting relief beyond that which Congress authorized on the ground that "safeguards must be provided against the dangers of the

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Emergence in the Adjudication of Criminal Cases, 84 J. CRIM. L. & CRIMINOLOGY 462, 478 (1993).

52. 318 U.S. 332 (1943).

53. In *Berger v. United States*, 295 U.S. 78 (1935), the Court ordered a new trial for a defendant prejudiced by the prosecutor's "undignified and intemperate" statements in closing argument that were "calculated to mislead the jury." *Id.* at 85. In addition to its oft-quoted homily on the duties of a prosecutor, the *Berger* Court reversed the conviction because the government's case was not strong and, therefore, the prosecutor's misconduct may have affected the jury's decision. *Id.* at 88-89. The Court did not hold explicitly that the trial was unfair or otherwise conducted improperly, which are the hallmarks of a reversal based on a due process violation. Indeed, the Court never identified the constitutional or statutory basis for its decision, but simply declared its authority to correct the harm caused by the prosecutorial misconduct. Although *Berger* may be more closely akin to an exercise of the Court's supervisory power to overturn the conviction, *McNabb* was the first case to rely specifically on the authority of the judiciary to oversee the conduct of proceedings in order to establish a rule governing the use of evidence obtained in a manner that did not violate the defendant's constitutional rights.

54. *McNabb*, 318 U.S. at 334-35. The federal agent's death occurred during a raid on an illegal whiskey operation maintained by the McNabbs, "a clan of Tennessee mountaineers living about twelve miles from Chattanooga in a section known as the McNabb Settlement." *Id.* at 333. The defendants were a pair of twin brothers and their cousin, all residents of the Settlement, and the Court noted their minimal education and that they had rarely left the confines of the Settlement. *Id.* at 334.

55. *Id.* at 338-39.

56. *Id.* at 340.

57. *Id.* at 345. Under 18 U.S.C. § 595 (1940), applicable at that time, the U.S. Marshall had to bring the defendant before the nearest commissioner or judicial officer for a hearing. Federal Rule of Criminal Procedure 5(a) superseded that provision in 1944. *See* FED. R. CRIM. P. 5 advisory committee's note (1944) ("The rule supersedes all statutory provisions on this point").

overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary."[58]

The Court in *McNabb* avoided the constitutional issue by relying on its own inherent judicial authority to advance the purpose expressed by the congressional enactment. While not invoking its constitutional authority as the basis for its decision, the Court nevertheless portrayed itself as a last bulwark against investigatory and prosecutorial excesses. *McNabb* neither explained the source of this previously unmentioned authority to exclude evidence based on an investigator's conduct occurring outside the courtroom nor the standard that would trigger this inherent judicial duty to establish and maintain "civilized standards of procedure and evidence."[59] The government had not violated any of the defendants' constitutional rights, at least as the Court had interpreted the Fourth and Fifth Amendments at that time, and no statutory provision compelled exclusion of the evidence. *McNabb* can be read as granting the federal courts broad authority to review the conduct of and prescribe rules for prosecutors and investigators appearing before them even when those practices do not traverse any specific right of a defendant.

An important limitation exists on this judicial supervisory power that distinguishes it from the broader due process protection which the Court later relied on to assert its authority to superintend outrageous government conduct. The supervisory power only applies to the federal courts because the Supreme Court does not exercise direct control over the procedures of state courts. When a court invokes its supervisory power, it acts only to ensure that the procedures over which it has direct authority conform to its requirements. On the other hand, due process applies to any judicial proceeding; thus rules adopted to apply the constitutional protection cut across jurisdictional lines. In that regard, supervisory power permits a court to dictate a wide variety of rules, but only to those courts under its direct control.

The Court's analysis in *McNabb* was the foundation for the later development of the exclusionary rule and the broadening of defendants' Fourth and Fifth Amendment rights.[60] Thereafter, controlling the conduct of the police

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58. *McNabb*, 318 U.S. at 343. The defendants in *McNabb* never argued for reversal of their convictions on statutory or supervisory power grounds. The Court justified its exercise of the supervisory authority to adopt an exclusionary rule by noting that its holding furthered the congressional policy behind a statute requiring federal agents to bring an arrestee before the court promptly—even though the agents did not violate the provision. *Id.* at 342-44. The purpose of that statute, however, was not to ensure expeditious judicial review of an arrest, but to prevent federal marshals from trying to extract larger fees by transporting prisoners long distances. *See* Fred E. Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442, 455-56 (1948).

59. 318 U.S. at 340.

60. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court noted that *McNabb* adopted an evidentiary rule for excluding evidence that was similar to the constitutional exclusionary rule applied by federal courts in *Weeks v. United States*, 232 U.S. 383 (1914). *Mapp*, 367 U.S. at 649-50. The *Mapp* Court extended the exclusionary rule remedy for Fourth Amendment violations to the states. *Id.* at 655.

and other investigatory agencies was a rubric with which the Court became quite comfortable, as witnessed by the Warren Court era. Indeed, the Court converted some of its earlier supervisory power rulings, which only governed federal prosecutions, into substantive constitutional protections applicable in any criminal proceeding.[61] Over time, lower courts began to exercise their supervisory power to adopt broader rules governing prosecutorial practices, not just police conduct. To enforce these new rules, judges claimed the authority to reverse convictions or dismiss indictments as a means of deterring the perceived misconduct of federal prosecutors, even if those actions did not violate any express rights of the defendant.

While Supreme Court decisions after *McNabb* continued to target the conduct of investigators,[62] lower courts also began applying their supervisory authority to prosecutorial conduct, especially at the grand jury stage of a proceeding. Exercising supervisory power over conduct before the grand jury filled a gap in the constitutional protections applicable during an investigation that allowed courts to adopt what were, in essence, ethical rules to overcome the constitutional silence.[63] For example, in *In re Grand Jury Proceedings (Schofield)*,[64] the Third Circuit held that for any item sought through a grand jury subpoena, prosecutors must furnish an affidavit explaining the relevance of the item and that it was not subpoenaed for some purpose other than an investigation within the grand jury's jurisdiction.[65] In *United States v. Jacobs*,[66]

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61. *See* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1451 (1984) (noting that "[a] number of the supervisory power decisions had constitutional overtones, and several of the decisions anticipated later constitutional rulings.").

62. Two leading Supreme Court cases after *McNabb* regarding the conduct of investigators were *Mallory v. United States*, 354 U.S. 449, 455 (1957) and *Elkins v. United States*, 364 U.S. 206, 222-23 (1960). *Mallory* excluded a confession given when the government unnecessarily delayed bringing the defendant before a judicial officer, while *Elkins* overruled the "silver platter" doctrine by excluding evidence from a federal proceeding that a state official had illegally seized. *See also* Rea v. United States, 350 U.S. 214, 217 (1956) (employing supervisory power to enjoin a federal agent from testifying in a state criminal trial about evidence illegally seized from the defendant and suppressed in federal prosecution). The principal case employing supervisory power to regulate prosecutorial conduct was *Jencks v. United States*, 353 U.S. 657 (1957). *Jencks* required that prosecutors produce memoranda of statements made by witnesses who testified on behalf of the government without first requiring the defendant to show that the prior statements were inconsistent with the later testimony. *Id.* at 666, 668-69. Congress modified the rule through a legislative enactment, known as the Jencks Act, that established the requirements for disclosure of witness statements after the person testifies. 18 U.S.C. § 3500 (1994); *see also* Ellen S. Podgor, *Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference*, 15 GA. ST. U. L. REV. 651 (1999) (describing development of the Jencks Act).

63. *See* Beale, *supra* note 61, at 1457 ("The lower federal courts have also employed their supervisory authority to control the conduct of the prosecutor in order to enforce ethical and professional standards . . . .").

64. 486 F.2d 85 (3d Cir. 1973).

65. *Id.* at 93.

66. 547 F.2d 772, 773-74 (2d Cir. 1976).

the Second Circuit dismissed an indictment because the prosecutor failed to warn the witness of the consequences of testifying falsely, as required by internal Justice Department guidelines. The court noted that its decision was "an *ad hoc* sanction . . . to enforce 'consistent performance' one way or another" with the requirement of fairness.[67] In *United States v. Estepa*[68] the same court dismissed an indictment under its supervisory power because the government relied exclusively on hearsay evidence of a government agent in seeking the indictment. The Second Circuit reached that conclusion despite the Supreme Court's explicit refusal in *Costello* to invoke the supervisory power to limit the prosecutor's use of hearsay before the grand jury.[69]

As the lower courts began applying their supervisory powers to review the conduct of prosecutors, the remedy shifted from using *McNabb*'s exclusionary rule to dismissing indictments or barring retrials because of prosecutorial misconduct. This development, which caught the Supreme Court's attention and led to a series of decisions extending the protective approach of *Costello*, largely eliminated supervisory power as a means of policing the conduct of prosecutors in grand jury proceedings.

B. Curtailing Supervisory Power

The lack of explicit constitutional constraints on the federal prosecutor's conduct during a grand jury investigation made the supervisory power doctrine the only means available for a court to curb tactics perceived as abuses of the government's power.[70] The use of a nonconstitutionally based judicial power to control the acts of prosecutors—granting defendants a remedy that served more as a deterrent to future misconduct than as a correction of a direct violation of the defendant's rights—raised a serious separation of powers

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67. *Id.* at 778 (citing United States v. Estepa, 471 F.2d 1132, 1136 (2d Cir. 1972)).

68. 471 F.2d 1132 (2d Cir. 1972). The court stated:

> We have previously condemned the casual attitude with respect to the presentation of evidence to a grand jury manifested by the decision of the Assistant United States Attorney to rely on testimony of the law enforcement officer who knew least, rather than subject the other officers, or himself, to some minor inconvenience . . . .

Id. at 1135 (citations omitted).

69. Costello v. United States, 350 U.S. 359, 364 (1956). The Second Circuit asserted that "we do not believe *Costello v. United States* would prevent this exercise of our supervisory powers should we deem it wise." *Estepa*, 471 F.2d at 1136 (citation omitted). The wisdom of the court's analysis is questionable, given that the Supreme Court explicitly rejected that very rule in *Costello*.

70. *See* Hon. John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423, 427 (1997) ("The judicial temptation to supervise [prosecutors] is powerful. It seems so natural: judges are more experienced, more dispassionate, better able to weigh the investigators' legitimate interests against principles of fairness and, presumably, wiser.").

question regarding the propriety of judicial intervention in the executive's exercise of prosecutorial discretion.[71] The problem was that as courts imposed more constraints on federal prosecutors, judges would have to delve into prosecutorial conduct in directing grand jury investigations. These challenges frequently arose before trial, giving defendants an opportunity to delay the proceedings while the court reviewed the government's conduct. The same problem with delay that troubled the Supreme Court in *Costello* arose again in the context of judges exercising their supervisory power to review grand jury proceedings. Ultimately, the exercise of a greater measure of control over prosecutors by lower federal courts caused the Supreme Court to circumscribe their supervisory power.

That process began in *United States v. Hasting*,[72] in which the Court held that the lower court's reversal of a conviction based on the supervisory power was improper unless the defendant could show prejudice traceable to the federal prosecutor's improper conduct.[73] The defendants challenged the

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71. *See* Beale, *supra* note 61, at 1514-16.

> [T]he federal courts' article III authority to interpret and apply the Constitution does not authorize the courts to formulate common law rules to control the conduct of the executive branch of the federal government. . . . [C]ontrary to the suggestion in several lower court decisions, neither supervisory power nor federal common law may be used to limit the constitutionally permissible exercise of prosecutorial discretion.

Id. at 1514, 1516 (citations omitted).

Professor Beale's influential article argued that the supervisory power of federal courts was narrow, reaching only "technical details and policies intrinsic to the litigation process, not the regulation of primary behavior and policies extrinsic to the litigation process." *Id.* at 1465. The Supreme Court cited her analysis in justifying its conclusion in *United States v. Williams*, 504 U.S. 36 (1992), which strictly limited the authority of federal courts to prescribe rules for prosecutors conducting grand jury investigations. *Id.* at 50; *see infra* notes 92-98 and accompanying text. Two federal district court judges also argue that a federal court's supervisory power does not reach the conduct of prosecutors. Judge Gleeson has stated that

> The supervisory power of federal district courts should be limited to fashioning remedies for violations of existing federal law and prescribing rules of procedure for their own, in-house proceedings. Once the supervisory power exceeds these boundaries, it intrudes on the functions and prerogatives of the other branches of government.

Gleeson, *supra* note 70, at 464; *see also* Murray M. Schwartz, *The Exercise of Supervisory Power by the Third Circuit Court of Appeals*, 27 VILL. L. REV. 506, 512-13 (1982) (arguing that the lack of a "persuasive theoretical framework" for exercising supervisory power "raises grave questions about the legitimacy of any exercise of supervisory power. Without a sound doctrinal basis, exercise of supervisory power can become little more than a device to enable a court of appeals to impose its policy judgments upon the district courts.").

72. 461 U.S. 499 (1983).

73. *Id.* at 512.

prosecutor's closing argument because it indirectly referred to the defendants' failure to testify. The Eighth Circuit reversed the conviction without considering whether the error was harmless.[74] According to the Court, the Eighth Circuit improperly focused only "on its concern that the prosecutors within its jurisdiction were indifferent to the frequent admonitions of the court" regarding proper closing arguments.[75] The Court noted that a remedy imposed solely to discipline or "chastise" prosecutors and deter future violations, even though the actual Fifth Amendment violation was harmless to the defendant, could not justify the use of the supervisory power.[76]

Hasting purported to circumscribe the remedy available through the exercise of a court's supervisory power by requiring a determination of prejudice to the defendant. The Court's analysis dealt only with a trial violation, allowing a jury verdict to support a finding that any error was harmless given the weight of the evidence.[77] However, in the investigatory stage, overcoming the harmless error hurdle would be easy if a court found that the misconduct had some potential effect on the grand jury's decision to indict.[78] As long as a court could reach this conclusion, *Hasting* imposed few limits on a court's supervisory power over the conduct of federal prosecutors before the grand jury.[79]

The Court imposed more substantial limits on the supervisory power of the lower courts in *United States v. Mechanik*[80] and *Bank of Nova Scotia v. United States*.[81] In *Mechanik* a majority of the Court held that, after a jury returned a verdict of guilty, any violation of the defendant's rights by a prosecutor before the grand jury could not serve as a basis for reversing the conviction.[82] The Court stated, "Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a

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74. *Id.* at 503-04.

75. *Id.* at 507.

76. *Id.* at 506-07 ("[T]he interests preserved by the doctrine of harmless error cannot be so lightly and casually ignored in order to chastise what the court viewed as prosecutorial overreaching."). The Court further noted that "deterrence is an inappropriate basis for reversal where, as here, the prosecutor's remark is at most an attenuated violation of *Griffin* and where means more narrowly tailored to deter objectionable prosecutorial conduct are available." *Id.* at 506. *See also* United States v. Young, 470 U.S. 1, 11-12 (1985) ("Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding.").

77. *Hasting*, 461 U.S. at 507.

78. *See, e.g.*, United States v. Hogan, 712 F.2d 757, 762 n.2 (2d Cir. 1983) (holding that *Hasting*'s prejudice requirement was met because "[i]f not for the clear prejudice resulting from the AUSA's misconduct, appellants *might* not have been indicted.") (emphasis added).

79. *Hasting*, 461 U.S. at 506-07.

80. 475 U.S. 66 (1986).

81. 487 U.S. 250 (1988).

82. *Mechanik*, 475 U.S. at 70.

reasonable doubt."[83] Justice O'Connor concurred in the judgment, but argued against the majority's *per se* approach. According to Justice O'Connor, rendering any grand jury problem moot once a jury returns a guilty verdict was too extreme because it would "undermine[] adherence to the very measures that this Court proposed and Congress implemented to guarantee that the grand jury is able to perform properly its screening function."[84] Instead, Justice O'Connor proposed that a reviewing court determine whether "the violation substantially influenced the grand jury's decision to indict, or if there is grave doubt as to whether it had such effect."[85]

Bank of Nova Scotia rejected supervisory powers as an independent basis for dismissing an indictment just to deter prosecutorial misconduct, holding that "[i]t would be inappropriate to devise a rule permitting federal courts to deal more sternly with nonconstitutional harmless errors than with constitutional errors that are likewise harmless."[86] The Court in *Bank of Nova Scotia* also adopted Justice O'Connor's test of prejudice in *Mechanik* to determine the propriety of an indictment's dismissal *before* trial because of prosecutorial misconduct in the grand jury investigation that did not violate the defendant's constitutional rights.[87] Under that test, a defendant must show that the violation "substantially influenced the grand jury's decision to indict" in order to secure a pretrial dismissal for prosecutorial misconduct.[88]

Did *Bank of Nova Scotia* alter *Mechanik*'s rule that a petit jury verdict renders moot any violation of a defendant's rights in the conduct of the grand jury investigation? The answer must be that it did not, because the procedural postures of the two cases compel distinct standards of measuring prejudice. After a jury convicts a defendant, the government has proven that person guilty beyond a reasonable doubt, unlike a preindictment dismissal in which the only determination was the grand jury's probable cause assessment in returning the indictment. If the defendant was found guilty by a jury, then no harm flowed from the earlier prosecutorial misconduct or violation of the defendant's constitutional rights, assuming the misconduct or violation did not impact the trial. If a defendant argues that he would not have been indicted but for the prosecutorial misconduct in the grand jury, it is difficult to see how that should affect a valid guilty verdict. In effect, the defendant argues, "I may be guilty of

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83. *Id.* (citations omitted). The violation in *Mechanik* involved the presence of two government agents testifying before the grand jury at the same time, which is prohibited by Federal Rule of Criminal Procedure 6(d). *Mechanik*, 475 U.S. at 67. The Fourth Circuit held that the violation of a rule so "plain and unequivocal" required automatic reversal of the conviction regardless of whether the defendant was prejudiced. United States v. Mechanik, 735 F.2d 136, 139-40 (4th Cir. 1984).

84. *Mechanik*, 475 U.S. at 77 (O'Connor, J., concurring).

85. *Id.* at 78 (citations omitted).

86. *Bank of Nova Scotia*, 487 U.S. at 256.

87. *Id.* at 256 ("We adopt for this purpose, at least where dismissal is sought for nonconstitutional error, the standard articulated by JUSTICE O'CONNOR in her concurring opinion in *United States v. Mechanik*.").

88. *Id.* (quoting United States v. Mechanik, 475 U.S. 66, 78 (1986)).

the crime, but the prosecutor also violated my rights at an earlier point in time." Shorn of the supervisory authority to dismiss an indictment or reverse a conviction only to deter prosecutorial misconduct, a court would be hard pressed to identify any real prejudice from a violation at the grand jury stage.

Despite its apparent logic, *Mechanik* created a troublesome perception of the prosecutor's role in the criminal justice system. Under the Court's *per se* approach to post-conviction judicial review of prosecutorial misconduct, the prosecutor's actions before the grand jury would be practically immune from any review once a jury returned a guilty verdict. In addition, if the jury finds the defendant not guilty, further consideration of the prosecutor's conduct is prohibited. While the possibility of a civil lawsuit exists, such a suit is highly unlikely to get past a motion to dismiss.[89] Thus, *Mechanik* appeared to give prosecutors a free ride in conducting the grand jury investigation of a case. That result is consistent with *Costello*, which prohibited judicial inquiry into the evidentiary basis for an indictment.[90] Under *Mechanik*, neither the propriety of an investigation nor the prosecutor's conduct in the grand jury can be used to challenge the indictment, because that would avoid *Costello*'s limitation on the authority of courts to review the grand jury's exercise of its accusatory function.

Because the denial of a defense motion to dismiss due to misconduct before the grand jury cannot be appealed before trial, *Mechanik* essentially limited review of prosecutorial misconduct to the trial court.[91] Moreover, *Mechanik* created an incentive for the trial court to *avoid* reviewing allegations of prosecutorial misconduct because once the jury returns its verdict, misconduct before the grand jury is moot. The standard endorsed in *Bank of Nova Scotia* for dismissal before trial was quite high, requiring the defendant to introduce proof that the misconduct created a "grave doubt" about the fairness of the grand jury's decision to indict.[92] The bar to substantive review of the grand jury's decision adopted in *Costello* makes proof of prejudice extremely difficult because a court cannot review the sufficiency of the evidence if the indictment is facially valid.

Mechanik and *Bank of Nova Scotia* largely eliminated supervisory power

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89. *See infra* notes 199-200 and accompanying text (discussing absolute prosecutorial immunity for prosecutors engaged in their advocacy function, including appearances before a grand jury).

90. Costello v. United States, 350 U.S. 359, 364 (1956).

91. *See* Midland Asphalt Corp. v. United States, 489 U.S. 794, 800 (1989) (denying motion to dismiss indictment because a violation of grand jury secrecy rule cannot be the subject of an interlocutory appeal). The Court dodged the issue of whether denial of a motion to dismiss could ever be reviewed after a guilty verdict by blandly asserting that postconviction review would effectively address whether the grand jury had probable cause to indict in light of any violations of the defendant's rights. *Id.* The Court noted that "whatever view one takes of the scope of *Mechanik* (an issue we need not resolve here), the present order is not immediately appealable." *Id.*

92. *Bank of Nova Scotia*, 487 U.S. at 256.

over allegations of misconduct by federal prosecutors before the grand jury.[93] Why has the Supreme Court taken such an apparently extreme position regarding prosecutorial misconduct, especially when it is willing to impose tougher requirements on the police in the investigatory phase of a case? The answer lies in reconciling the judiciary's authority under Article III with the effect of exercising a broad supervisory power over the executive branch. Judicial inquiry into the government's reasons for acting would force courts to look at the strength of the government's case and assess its reasons for pursuing particular tactics. Judicial review inevitably leads to judicial interference, a point the Court noted in *Costello* when it stated that grand jury proceedings are informal and not subject to the rules of evidence.[94] Since *Costello*, the Court has held that the use of illegally seized evidence does not taint a grand jury's decision to indict.[95] How could the Court permit evidence that admittedly was the product of a constitutional violation to go before the grand jury while simultaneously curtailing judicial authority to review prosecutorial misconduct in the same forum? The Court's resolution of the issue has been quite consistent: the need to limit interference with the grand jury's investigation, and the prosecutor's conduct in leading the proceedings, supersedes the demand for judicial control exercised through the inherent power of the judiciary.

C. Ratifying Prosecutorial Control of Grand Jury Investigations

Even though the grand jury has the right to "every man's evidence,"[96] the methods used to obtain evidence for presentation to the grand jury could provide an avenue for challenging the conduct of the prosecutor. Unlike conduct in the grand jury room, which requires a defendant to demonstrate prejudice before relief can be granted,[97] the prosecutor's conduct in the acquisition of evidence under the auspices of the grand jury appears to fall

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93. That is not to say that the Supreme Court has forsworn using its supervisory power completely. In *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787 (1987), decided between *Mechanik* and *Bank of Nova Scotia*, the Court relied on its supervisory authority to overturn a criminal contempt conviction. The contempt conviction was based on the violation of an injunction issued in a civil proceeding that had been prosecuted by counsel for the plaintiff in the underlying civil action. The Court found that there was a "*potential* for private interest to influence the discharge of public duty." *Id.* at 805. The Court justified its use of the supervisory power as "especially appropriate in the determination of the procedures to be employed by courts to enforce their orders, a subject that directly concerns the functioning of the Judiciary." *Id.* at 809. Under the Federal Rules of Criminal Procedure, a criminal contempt proceeding is initiated on notice to the party of the "essential facts" supporting the charge, not by a grand jury indictment. FED. R. CRIM. P. 42(b). *Young* did not affect the Court's restrictive view of the supervisory power as applied to prosecutorial conduct in grand jury investigations.

94. *Costello*, 350 U.S. at 364.

95. United States v. Calandra, 414 U.S. 338, 351-52 (1974).

96. *Id.* at 345.

97. *Bank of Nova Scotia*, 487 U.S. at 263.

outside the Court's restrictive approach in *Mechanik* and *Bank of Nova Scotia*.

A grand jury subpoena can be issued by the prosecutor without prior approval by the court, although the grand jury must rely on the court to enforce the subpoena if the recipient refuses to respond.[98] Subpoenas are not subject to the Fourth Amendment's reasonableness requirement, as the Supreme Court held in *United States v. Dionisio*,[99] but under Federal Rule of Criminal Procedure 17(c) a party may challenge a subpoena if it is "unreasonable or oppressive."[100] Can a defendant challenge the prosecutor's decision to seek the production of items or a witness's appearance to testify by arguing that the investigation is unreasonable or the means used to gather information oppressive, in the sense of being unfair? While Rule 17(c) appears broad, the Court has made it virtually impossible to use the Rule, in the context of grand jury subpoenas, to question the prosecutor's conduct of the grand jury investigation.

For example, in *United States v. R. Enterprises*[101] the Court held that Rule 17(c)'s reasonableness standard for assessing a grand jury subpoena meant that "the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation."[102] The Court placed the burden of challenging the reasonableness of the subpoena on the recipient, finding that "a grand jury subpoena issued through normal channels is presumed to be reasonable . . . ."[103] The *R. Enterprises* standard for enforcing a subpoena is quite low, given that a grand jury can investigate conduct to assure itself that there was no legal violation. The prosecutor's reasons for issuing a subpoena, and a court's unease over the prosecutor's choice of tactics, are irrelevant to the question of whether the subject of the subpoena is within the broad purview of the grand jury. While the Court asserted that "[t]he investigatory powers of the grand jury are nevertheless not unlimited,"[104] it does not appear possible to challenge a prosecutor's use of the grand jury to gather evidence on the ground that the prosecutor improperly sought to compel the production of documents or appearance of a witness.[105]

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98. FED. R. CRIM. P. 42.

99. 410 U.S. 1, 9 (1973) ("It is clear that a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome.").

100. FED. R. CRIM. P. 17(c).

101. 498 U.S. 292 (1991).

102. *Id.* at 301.

103. *Id.*

104. *Id.* at 299 (citations omitted).

105. Subpoena recipients are sometimes successful in quashing a grand jury subpoena, but on narrower grounds such as the assertion of a valid privilege or a claim that the volume of records sought is too great, so the subpoena needs to be narrowed. Among the most frequently litigated issues involves the privilege against self-incrimination as a ground to resist the production of documents. *See, e.g., In re* Three Grand Jury Subpoenas *Duces Tecum* Dated

Upon gathering evidence, the next step is for the prosecutor to present the evidence to the grand jurors and decide whether to request that the grand jury indict the defendant.[106] As the process moves from gathering evidence to its presentation, the issue arises as to what evidence a prosecutor should provide to the grand jury. At one point, a few decisions required the prosecutor to present exculpatory evidence to the grand jury before seeking an indictment.[107] However, in *United States v. Williams*[108] the Court demonstrated its aversion to permitting judicial review of prosecutorial decisionmaking by rejecting a rule that would require federal prosecutors to present exculpatory evidence to the grand jury.[109] In *Williams* the trial court used its supervisory power to dismiss an indictment because the prosecutor failed to present "substantial exculpatory evidence" to the grand jury prior to the indictment.[110]

The trial court's exercise of supervisory authority appeared quite fair as a means for maintaining the integrity of the judicial system. If the grand jury serves as a buffer between the government and the institution of criminal charges, then requiring the prosecutor to present exculpatory evidence should not be a controversial proposition, especially when the prosecutor's job is to ensure "that justice shall be done."[111] Yet, a majority of the Court reached the opposite conclusion in *Williams*, holding that the prosecutor had no duty to present exculpatory evidence because a federal court cannot (a) compel the grand jury to consider any type of information in deciding whether probable cause exists, or (b) inquire into the evidence on which the grand jury based its finding.[112] In reaching that conclusion, *Williams* virtually eliminated the supervisory authority of courts over the conduct of grand jury investigations.

January 29, 1999, 191 F.3d 173, 177 (2d Cir. 1999) (discussing lack of personal privilege when holding records as a representative of an entity); Peter J. Henning, *Finding What Was Lost: Sorting Out the Custodian's Privilege Against Self-Incrimination from the Compelled Production of Records*, 77 NEB. L. REV. 34 (1998) (discussing the custodian's role in subpoenaed records). Those challenges, however, do not call into question the propriety of the prosecutor's conduct, which falls outside the purview of a court considering a challenge to the grand jury.

106. United States v. Ciambrone, 601 F.2d 616, 622 (2d Cir. 1979).

107. *See, e.g., id.* at 623 (stating that the prosecutor should tell the grand jury of "substantial evidence negating guilt."); Johnson v. Superior Court, 539 P.2d 792, 794 (Cal. 1975) ("When a [prosecutor] seeking an indictment is aware of evidence reasonably tending to negate guilt, he is obligated . . . to inform the grand jury of its nature and existence.").

108. 504 U.S. 36 (1992).

109. *Id.* at 55.

110. *Id.* at 39 (citing United States v. Page, 808 F.2d 723, 728 (10th Cir. 1987)). The indictment charged the defendant with seven counts of submitting false statements regarding his assets and income to federally insured financial institutions for the purpose of influencing decisions on loan applications. *Id.* at 38. Among the materials the defendant asserted the government had not furnished to the grand jurors were general ledgers, tax returns, and his testimony in a bankruptcy court proceeding that, according to the defendant, showed he had not intended to mislead the banks. *Id.* at 39.

111. Berger v. United States, 295 U.S. 78, 88 (1935).

112. *Williams*, 504 U.S. at 53 ("We reject the attempt to convert a nonexistent duty of the grand jury itself into an obligation of the prosecutor.").

The Court reasoned that "because the grand jury is an institution separate from the courts . . . as a general matter at least, no such 'supervisory' judicial authority exists . . . ."[113] *Williams* sounded the deathknell for supervisory judicial review of prosecutorial actions before the grand jury.[114]

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113. *Id.* at 47. The Court reiterated the limit on supervisory power over the grand jury, stating that:

> [A]ny power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings. It certainly would not permit judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself.

Id. at 50 (citations omitted).

114. While *Williams* placed grand jury conduct largely beyond the purview of the courts, supervisory authority remains available in other contexts to dismiss actions in order to control or prohibit governmental misconduct, even when it occurred outside the direct purview of the trial judge. In *Wang v. Reno*, 81 F.3d 808 (9th Cir. 1996), the Ninth Circuit upheld an order barring the government from deporting an alien previously paroled into the United States and used by the government as a prosecution witness. *Id.* at 821. The court found that the witness faced an almost certain death sentence based on his testimony in the government's case, and that "the extraordinary nature of the government's misconduct in securing Wang as a prosecution witness . . . counsel in favor of an exercise of supervisory power." *Id.* at 820. In *United States v. Ming He*, 94 F.3d 782 (2d Cir. 1996), the Second Circuit relied on its supervisory power to require that prosecutors permit cooperating witnesses to have counsel present during debriefings with the government. *Id.* at 793. The court in *Ming He* distinguished its use of the supervisory power from cases such as *United States v. Payner*, 447 U.S. 727 (1980), which prohibited courts from using their authority as a supplement to the Fourth Amendment's protections. *Ming He*, 94 F.3d at 792-93. The Second Circuit stated:

> [Our decision] is not an encroachment on the conduct of executive branch officials, that is, we are not attempting to govern the conduct of federal agents whose task is to investigate and prevent criminal activity. Rather, we are enforcing our general supervisory authority over members of the bar of this Court, lawyers who are at the same time United States attorneys . . . .

Id. at 792 (citations omitted).

The circuit court was playing a judicial shell game, asserting that it was only regulating the conduct of lawyers who *coincidentally* happened to be prosecutors. In fact, however, the court asserted control over the conduct of another branch of the government under the guise of its Article III authority to regulate its own proceedings. Judge Gleeson, a district judge in the Second Circuit, criticized *Ming He* as a decision that "plainly exceed[ed] the boundaries of the supervisory power." Gleeson, *supra* note 70, at 465.

That courts sometimes still exercise their supervisory power can obfuscate the limited nature of that authority after *Williams*, especially when the conduct involves a grand jury investigation. For example, in *United States v. Taylor*, 956 F. Supp. 622 (D.S.C. 1997), *rev'd sub nom. United States v. Derrick*, 163 F.3d 799 (4th Cir. 1998), a district court dismissed an indictment because "the court believes it has the discretion under the doctrine of the court's supervisory power to dismiss should it find the government's actions so outrageous as to offend the sensibilities of the court." *Taylor*, 956 F. Supp. at 623. Although the trial court's lengthy

One could argue in support of the Tenth Circuit's rule that the exculpatory information requirement would have a prophylactic effect. Rather than risk dismissal of an indictment, prosecutors would err on the side of disclosure and present everything arguably relevant to a grand jury. However, that rule might also burden the grand jury with extraneous information and perhaps subject the prosecutor to allegations that the defendant's exculpatory evidence had not been presented *properly*. Regardless of whether the benefits of such a rule outweigh its burdens, *Williams* was not an aberration.[115] The Court chose a path consistent with its approach in *Mechanik*, *Bank of Nova Scotia*, and *Costello* by eliminating the possibility of judicial review of prosecutorial misconduct in a grand jury investigation.[116] The thrust of *Williams* was to insulate the prosecutor's conduct so that the development of the information on which the

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opinion catalogues extensive government misconduct at both the grand jury and trial stages, including examples of "silence in several instances [that] constitutes subornation of perjury," *id.* at 660, it never discussed prejudice to the defendants, as mandated by *Hasting* and *Bank of Nova Scotia*, as the prerequisite for the exercise of a court's supervisory power to dismiss an indictment. The Fourth Circuit reversed the dismissal of the indictment, stating that "the record does not even support the district court's individual 'findings' of prosecutorial misconduct, much less that there has been an established pattern of prosecutorial misconduct in these cases that would justify the extraordinary sanction of the dismissal of the defendants' indictments." *Derrick*, 163 F.3d at 810. As the reinstatement of the indictments in *Derrick* showed, even a purportedly egregious finding of misconduct does not negate the need to determine prejudice to the defendant, especially when the misconduct included actions by the prosecutors before the grand jury that fall outside the scope of the court's direct authority to control.

115. To demonstrate, assume that *Williams* had reached the result advocated by Justice Stevens in his dissent, i.e., that a court could dismiss an indictment under its supervisory power "if the withheld evidence would plainly preclude a finding of probable cause." 504 U.S. at 70 (Stevens, J., dissenting). The analysis under such a rule would require deciding two related questions. First, why did the government withhold the evidence? Second, would the withheld information have undermined the grand jury's probable cause determination, would it have produced prejudice? The exercise of supervisory power to demand an explanation for withholding the information could not be limited to just the second evidentiary question, because the Court's decision in *Costello* prohibited judicial review of the sufficiency of the evidence supporting a facially valid indictment. Costello v. United States, 350 U.S. 359, 363 (1956). Unless it was just a subterfuge to engage in a review of the strength of the government's evidence, the supervisory power analysis must begin by addressing why the government did not furnish the exculpatory evidence to the grand jury. If the court accepted the government's justification for withholding the evidence, then an exercise of supervisory power would not be appropriate because a court cannot dismiss a facially valid indictment under *Costello*. *Id.* Only after finding the government's explanation deficient would a court then be empowered to conduct a review of the substance of the evidence considered by the grand jury in order to assess the effect the withheld information would have had on the decision to indict. Assessing prosecutorial intentions would be the condition for an exercise of supervisory power because the reviewing court would have to determine that the prosecutor acted improperly before deciding whether the conduct prejudiced the defendant. Thus, the supervisory power analysis requires a court to scrutinize closely the prosecutor's knowledge and intent as the primary focus of the determination of whether the government should be sanctioned.

116. *See* Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1988); United States v. Mechanik, 475 U.S. 66, 78 (1986); *Costello*, 350 U.S. at 363.

grand jury acts remains free from any outside intervention.

III. THE "PERJURY TRAP" CHIMERA

The government can pursue a number of avenues when gathering evidence and preparing to bring formal charges against the defendant. The Fourth Amendment's protection against unreasonable searches and seizures, along with the requirement that the government demonstrate probable cause for the issuance of a warrant, are the principal limitations at the investigative stage of a criminal case.[117] Prosecutorial involvement in the preliminary stages of a criminal investigation is often quite limited in cases involving common street crimes; rarely is the prosecutor engaged in an actual search or arrest of a suspect beyond advising officers before the fact regarding the warrant or the scope of permissible actions. On the other hand, for more complex cases, especially involving economic crimes, the government attorney frequently controls the investigation from the earliest stages and, as the case advances, will determine how to present the evidence to a grand jury.[118]

The target of an investigation, the person who the prosecutor believes may have violated the law, can be a tempting source of information in white collar crime investigations. Prosecutors often seek to compel targets to provide documents that can be used to demonstrate their knowledge of or involvement in the transactions at issue. The government may even call a target before the grand jury to testify without telling that person their status in the investigation.[119] While the grand jury appearance can give targets an opportunity to present their side of the story, sometimes prosecutors hope that witnesses will attempt to explain away their conduct through dissembling statements—which can be used later at trial to impeach them—or even lie about their role in the crime. Using the grand jury with the expectation that a

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117. U.S. CONST. amend. IV.

118. *See* Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?*, 54 U. PITT. L. REV. 405, 409 (1993).

> The principal differences between street crime and white collar investigations are twofold: First, the key players in the white collar investigation are the prosecutor and law enforcement agents assigned to work with the prosecuting body on one side, and counsel for witnesses and targets on the other side; second, the timing of the prosecutor's and defense attorney's involvement is earlier in the investigative process, well before *Miranda* and Sixth Amendment rights are implicated.

119. *See* United States v. Washington, 431 U.S. 181, 189 (1977) ("Because target witness status neither enlarges nor diminishes the constitutional protection against compelled self-incrimination, potential-defendant warnings add nothing of value to protection of Fifth Amendment rights.").

witness will make false or misleading statements has given rise to something called the "perjury trap" claim. Defendants charged with perjury occasionally assert that the prosecutor called the witness before the grand jury expecting that person to lie, a ruse that manufactures a crime where none existed previously. The argument is that a prosecutor calling a person to testify with the knowledge that the witness may lie, creating the basis for a separate criminal prosecution, is an unacceptable use of the grand jury that violates the witness's due process right. For example, the Independent Counsel's demand that President Clinton testify before the grand jury regarding his conduct in the Paula Jones civil litigation was criticized as an attempt to set a perjury trap.[120] Apparently, the Independent Counsel's trap (if that is what it was) worked rather well because the impeachment articles centered largely on the President's perjured grand jury testimony.[121]

Does setting a perjury trap constitute prosecutorial misconduct by usurping the proper function of the grand jury in violation of the witness's due process rights? The few courts that have considered the issue frame the question as "whether there was a premeditated design on the part of the government to trap the witness into perjury in such an *unfair* way that a due process test may provide a viable defense."[122] The focus is on the prosecutor's motive for calling the witness that lied to the grand jury: Was the government's goal to compel testimony that would serve as the sole basis for indicting the defendant, especially when other violations have been lost due to the passage of time, or did the prosecutor seek truthful testimony?[123] Under this test, the perjury trap

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120. *See* Robert G. Morvillo, *Perjury Traps and Dilemmas*, N.Y. L.J., Oct. 6, 1998, at 3 ("One of the oft-repeated descriptions of independent counsel Starr's demand that President Clinton testify before the grand jury is that it unfairly created a 'perjury trap' for the President."); Jeffrey Rosen, *The Perjury Trap*, THE NEW YORKER, Aug. 10, 1998, at 28 ("What Starr really represents, one might say, is the insidious transformation of the Office of the Independent Counsel into a Ministry of Truth.").

121. *See* 144 CONG. REC. H12042 (1998) (daily ed. Dec. 19, 1998) (Articles of Impeachment of President William Jefferson Clinton).

122. United States v. Simone, 627 F. Supp. 1264, 1269 (D.N.J. 1986); *see* United States v. Chen, 933 F.2d 793, 796 (9th Cir. 1991) ("A perjury trap is created when the government calls a witness before the grand jury for the primary purpose of obtaining testimony from him in order to prosecute him later for perjury."); Nixon v. United States, 703 F. Supp. 538, 564 (S.D. Miss. 1988) (requiring defendant to show that prosecutor called witness to testify before grand jury "with the purpose of eliciting perjury.").

123. *See* Bennett L. Gershman, *The "Perjury Trap,"* 129 U. PA. L. REV. 624, 683 (1981) ("When the prosecutor structures the grand jury proceedings with the purpose of trapping a grand jury witness in perjury, he abuses both the perjury sanction and the grand jury."). Professor Gershman argues that the perjury trap analysis should prohibit a prosecution when it was the "active *design*" of the government that the witness lie, but not when the prosecutor merely expects perjury to take place. *Id.* at 685. In *United States v. Caputo*, 633 F. Supp. 1479 (E.D. Pa. 1986), a district court made the same delineation between proper and improper prosecutorial intent: "The government may call a witness with the expectation that he may commit perjury, but it may not call the witness for the purpose of securing a perjury indictment." *Id.* at 1487 (citations omitted). It is difficult to see how those two intentions can be distinguished, assuming that there is a difference between them, except by asking the prosecutor

claim has occasionally been raised, but it has never been asserted successfully.[124]

The perjury trap claim is an offshoot of a broader analysis adopted by the Supreme Court to control the tactics of investigators operating undercover. There are two aspects of this analysis: the entrapment defense and a due process claim based on outrageous government conduct. The issue of the government creating crime, not just prosecuting it, has called for the Court to balance the need for vigorous law enforcement with the perception of unfairness when the government takes too great a role in tempting persons to commit crimes they might not otherwise consider. This broader issue is parallel to the question of how the judiciary's supervisory power should be used to control the government's investigation of criminal conduct. The following section examines the Supreme Court's balancing of these competing concerns through the entrapment defense and outrageous government conduct claim. The discussion then focuses on how the prosecutor's conduct in the grand jury, even if a true perjury trap, is far beyond a court's authority to control through judicial review.

A. Development of the Entrapment Defense

While most criminal investigations begin after the commission of a crime, instances exist in which a government agent or informant proposes a course of illegal conduct in the hope that others will respond favorably, leading to their arrest before the scheme reaches fruition. The childhood adage that "it takes

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for the reason the grand jury summoned the witness to testify. Asking prosecutors to justify their decisions in a challenge to the indictment is unlikely to yield any useful information for the court to evaluate the propriety of the government's conduct. To the contrary, the inquiry is likely to be harmful to the criminal justice system because prosecutors will have an incentive to frame their response to protect the indictment. *See* Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH U. L.Q (forthcoming 1999).

124. *See* United States v. Regan, 103 F.3d 1072, 1079 (2d Cir. 1997) ("[W]e find that the facts of this case 'render the perjury trap defense inapplicable' and thus do not decide whether this defense is available in the Second Circuit."); United States v. Chevoor, 526 F.2d 178, 185 (1st Cir. 1975) ("We cannot say that calling Chevoor in these circumstances even in the anticipation that he would perjure himself is beyond the pale of permissible prosecutorial conduct."); United States v. Nickels, 502 F.2d 1173, 1176 (7th Cir. 1974) ("Since the questions were material to the grand jury's investigation, we doubt that we can inquire into the motivation for asking them."); United States v. Lazaros, 480 F.2d 174, 177 (6th Cir. 1973) ("Regardless of the actual beliefs of the United States Attorney, the grand jury was entitled to hear Lazaros's testimony."); United States v. Phillips, 674 F. Supp. 1144, 1146 (E.D. Pa. 1987) (rejecting a perjury trap argument on the ground that "[t]he record simply does not establish the type of outrageous conduct which must be shown before a due process violation will be found."); United States v. Gonzales, 620 F. Supp. 1143, 1149 (N.D. Ill. 1985) ("[Defendant] cannot be insulated from a perjury charge solely because he said what the government anticipated he probably would say."); United States v. Crisconi, 520 F. Supp. 915, 920 (D. Del. 1981) ("[T]hat the Grand Jury was not used as a 'schill' for securing a perjury indictment against Crisconi is also demonstrated by the fact that the Grand Jury continued to take testimony relating to the substantive Hobbs Act violations . . . well beyond Crisconi's last appearance before the Grand Jury . . . .").

one to know one" is especially amenable to criminal investigations. Whether through one of its own agents or with a cooperating witness, the government sometimes must initiate the illicit plan in order to draw out the criminal element.[125] For example, sting operations involving purchases of stolen goods by police officers are routine, and are often supported by photographic evidence of the criminals selling their wares and tapes of them boasting about even greater hauls in the future. A more recent development in the area of drug and money-laundering investigations involves the so-called "reverse" sting, in which the government supplies the narcotics or tainted funds and then arrests the purchaser or launderer that attempts to assist the governmental agents.[126] Can the government go too far by luring an otherwise innocent citizen into a criminal scheme and then turn around and charge that person with the crime that it fostered? The defense of entrapment answers that question in the affirmative. Chief Justice Warren summarized the scope of the defense in the simple, if opaque, statement that there must be "a line . . . between the trap for the unwary innocent and the trap for the unwary criminal."[127] The distinction recognized by the Court cannot be easily discerned, however, because while the entrapment defense allows the government to draw a criminal into its scheme, its tactics must not attract an innocent person at the same time.

The Supreme Court first reversed a conviction because the government impermissibly enticed an innocent person into committing a crime in *Sorrells v. United States*.[128] A government investigator, posing as a tourist, and three

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125. *See* Sorrells v. United States, 287 U.S. 435, 441 (1932) ("Artifice and stratagem may be employed to catch those engaged in criminal enterprises.") (citations omitted).

126. *See* Conrad F. Meis, Note, United States v. Tucker*: The Illegitimate Death of the Outrageous Governmental Conduct Defense?*, 80 IOWA L. REV. 955 n.7 (1995):

> [R]everse stings create the opportunity for the government to create the entire crime, entice an individual who otherwise never would have broken the law to participate in the crime, and prosecute the individual for submitting to the government agent's persuasion. Unlike regular sting operations in which the government seeks to convict people who are already trying to commit a crime by selling contraband, in reverse stings the government may create a crime that never would have occurred if not for the government's conduct.

Id. at 955-56 n.7.

127. Sherman v. United States, 356 U.S. 369, 372 (1958).

128. 287 U.S. 435 (1932). A series of cases in the late nineteenth century involving decoy letters designed to entice defendants into sending obscene materials through the mails rejected the argument that the government's initiation of the criminal activity barred prosecution. *See* Grimm v. United States, 156 U.S. 604, 610 (1895) ("The mere facts that the letters were written under an assumed name, and that he was a government official . . . do not of themselves constitute a defence to the crime actually committed."); Goode v. United States, 159 U.S. 663, 669 (1895) ("[T]he fact that certain prohibited pictures and prints were drawn out of the defendant, by a decoy letter written by a government detective, was no defence to an indictment for mailing such prohibited publications."); Rosen v. United States, 161 U.S. 29, 42 (1896)

friends of the defendant Sorrells, playing on his sympathy for a fellow war veteran, thrice implored Sorrells to secure some liquor, which was illegal under the prohibition laws then in effect. The defendant, described by the Court as "an industrious, law-abiding citizen," succumbed to the government agent's "gross abuse of authority."[129] Having described the defendant in such glowing terms and castigated an investigator who "deserves the severest condemnation,"[130] the Court concluded that the government entrapped Sorrells and reversed the conviction.[131] While the result was easily reached, the Justices hotly contested the theoretical foundation for the entrapment defense. The majority adopted a subjective test, demanding that the government prove that the defendant was predisposed to commit a crime.[132] Justice Roberts proposed a different theory, based on the character of the government's conduct; under Robert's theory, the use of improper investigatory tactics to trap an innocent person should estop the prosecutor from seeking a conviction because of "the inherent right of the court not to be made the instrument of wrong."[133]

The Court's recognition of the entrapment defense was not based on the Due Process Clause or any other constitutional protection afforded a defendant. Instead, the *Sorrells* majority held that as a matter of statutory interpretation, every criminal provision adopted by Congress permits a defendant to assert an entrapment defense.[134] To hold otherwise, according to the majority, would be "contrary to the purpose of the law . . . [and] inconsistent with its proper enforcement."[135] By interpreting the statute rather than applying a constitutional analysis, *Sorrells* applied only to prosecutions brought under federal law.[136]

(quoting *Goode* for the same proposition); Andrews v. United States, 162 U.S. 420, 423 (1896) (quoting *Grimm* argument that government officials conduct was not a defense to unlawful acts); Price v. United States, 165 U.S. 311, 315 (1897) (stating government instigation is not a ground for reversal when prohibited books are sent through United States mail).

129. *Sorrells*, 287 U.S. at 441.

130. *Id.*

131. *Id.* at 452.

132. *Id.* at 451.

133. *Id.* at 456 (Roberts, J., concurring).

134. *Id.* at 450-51.

135. *Sorrells*, 287 U.S. at 446. The majority further noted that it was unable to conclude that Congress, in enacting the statute, intended that "its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them." *Id.* at 448; *see also* Jason R. Schulze, Note, United States v. Tucker*: Can the Sixth Circuit Really Abolish the Outrageous Government Conduct Defense?*, 45 DEPAUL L. REV. 943, 946 (1996) (noting that "[t]he majority in *Sorrells* justified its creation of the entrapment defense by examining hidden Congressional intent.") (citation omitted).

136. Justice Roberts's separate opinion criticized this approach as a "new method of rationalizing the defense.... This seems a strained and unwarranted construction of the statute; and amounts, in fact, to judicial amendment." *Sorrells*, 287 U.S. at 455-56 (Roberts, J., concurring). According to Professors LaFave & Israel,

> [The subjective test of entrapment] is adhered to by the federal courts as well as a majority of the state courts... [while] [t]he objective approach is favored

The Court's rationale for permitting defendants to raise an entrapment defense was that "such an application is so shocking to the sense of justice that it has been urged that it is the duty of the court to stop the prosecution in the interest of the Government itself, to protect it from the illegal conduct of its officers and to preserve the purity of its courts."[137]

A second foray into entrapment came twenty-six years later in *Sherman v. United States*.[138] In *Sherman* the Court discussed the entrapment of a virtuous recovering narcotics addict who finally capitulated to a government informant's repeated entreaties for drugs in order to relieve the informant's "presumed suffering."[139] The Court reiterated that the subjective test constituted the whole of the entrapment defense and held that the government informant's conduct rose to the level of entrapment as a matter of law.[140] The *Sherman* majority rejected Justice Frankfurter's call to adopt an objective test that would incorporate the nature of the government's conduct in determining whether the government entrapped the defendant.[141]

> by a majority of the commentators, and is reflected in the formulation of the entrapment defense appearing in the American Law Institute's Model Penal Code. At least eleven states have adopted it either by statute or judicial decision. A few other jurisdictions have adopted a combination of the objective and subjective tests.

LAFAVE & ISRAEL, *supra* note 29 § 5.2(b), at 280; *see also* Laura Gardner Webster, *Building a Better Mousetrap: Reconstructing Federal Entrapment Theory from* Sorrells *to* Mathews, 32 ARIZ. L. REV. 605, 633 (1990) (arguing that entrapment should be based on a rights-based principle and not viewed as a defense).

137. *Sorrells*, 287 U.S. at 446. Justice Roberts's separate opinion arguing for an objective test of entrapment used similar language:

> [Entrapment] rests . . . on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law.

Id. at 457 (Roberts, J., concurring).

The tenor of *Sorrells* was similar to the Court's approach eight years later in *McNabb v. United States*, when it exercised the supervisory power to curb another type of investigatory abuse, the "third degree" form of interrogation. *See* McNabb v. United States, 318 U.S. 332, 344 (1943).

138. 356 U.S. 369 (1958).

139. *Id.* at 371.

140. *Id.* at 373.

141. *Id.* at 376. The majority focused on the prosecution's failure to prove the defendant's predisposition to sell drugs, finding that the government's arguments were "unsupported." *Id.* at 375. Justice Frankfurter called for adoption of the objective test on the ground that "courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced." *Id.* at 380 (Frankfurter, J., concurring). Justice Frankfurter proposed relying on the judiciary's

The majority opinions in *Sorrells* and *Sherman* focused the entrapment defense on the defendant's predilection to commit a crime, yet both cases discussed extensively the impropriety of the government's tactics. *Sorrells* described the investigator's acts as a "gross abuse of authority,"[142] while *Sherman* found circumstances in which "stealth and strategy become as objectionable [as] police methods [such] as the coerced confession and the unlawful search."[143] The shameful nature of the government's conduct would seem to be irrelevant to the question of whether the defendant's subjective intent was to commit a criminal act even without the government's inducements. Yet, for the Court not to portray the government's conduct negatively and the defendant's virtuously is difficult, when the effect of a successful entrapment defense is an acquittal based in part on a finding that the government acted improperly.

Ultimately, *Sorrells* and *Sherman* sent a mixed message about the subjectiveness of the entrapment test. Successful assertion of the defense required objectively characterizing the government's conduct as impermissible in order to support the subjective conclusion that the defendant was an "unwary innocent," not an "unwary criminal."[144] Regardless of whether the test for entrapment formally incorporated an evaluation of the government's conduct as a formal element, investigatory tactics always played a role when a defendant raised an entrapment defense.[145]

Entrapment is a statutory defense because the Court decreed that it is, in effect, an element of every offense, one facet of the government's proof of the

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inherent supervisory power rather than the statutory interpretation theory offered as a justification for the entrapment defense in *Sorrells*. *See id.* at 381. Under either approach, the Court's entrapment analysis would only apply in federal prosecutions, not state criminal proceedings.

142. 287 U.S. at 441.

143. 356 U.S. at 372.

144. *Id.*

145. The Court's most recent entrapment case, *Jacobson v. United States*, 503 U.S. 540 (1992), highlights the continuing tension between the subjective test, which it professed to follow, and the importance of the government's investigatory tactics in assessing an entrapment claim. In *Jacobson* the Court reversed a conviction for receiving child pornography because the government had failed as a matter of law to prove that the defendant was predisposed to commit the crime *before* being approached by agents trying to sell to him the illicit material. The Court highlighted the government's repeated attempts to persuade the defendant to purchase the material over twenty-six months "through five fictitious organizations and a bogus pen pal" before he finally succumbed. *Id.* at 543. Moreover, the Court depicted the defendant sympathetically, noting for no apparent reason that he was "a 56-year-old veteran-turned-farmer who supported his elderly father in Nebraska . . . ." *Id.* at 542. The government's conduct was never far from the surface in *Jacobson*, despite the Court's purported adherence to the subjective test, because of the need to cast the defendant, who admitted committing the crime, in a sympathetic light and the investigators as overbearing the will of this unwary innocent. *See* Paul Marcus, *Presenting, Back From the [Almost] Dead, The Entrapment Defense*, 47 FLA. L. REV. 205, 219 (1995) ("The language of the Supreme Court in *Sherman* and *Jacobson* signals genuine movement from an exclusive focus on the defendant's state of mind to a much more searching view of the government's behavior.").

applicable *mens rea*. In turn, the government's conduct in enticing the defendant appears to be one aspect of assessing the defendant's innocent state of mind. Because the Court's analysis of governmental misconduct arose only in connection with the statutory entrapment defense, such misconduct would not seem to create a separate constitutional claim.[146] Unfortunately, the entrapment cases were not models of clarity, to say the least, as reflected by the Court's struggle to explain clearly how the nature of the government's conduct related to the defendant's predisposition to commit the crime.

B. Recognizing an Outrageous Government Conduct Claim

One attempt by Justice Rehnquist to articulate how the nature of the government's conduct related to the viability of an entrapment defense came in *United States v. Russell*.[147] This attempt resulted in a slip of the judicial tongue that inadvertently recognized a second means to challenge misconduct in an investigation. In *Russell* an undercover narcotics agent provided the defendants with a key chemical for their production of an illegal drug. The lower court reversed the conviction on the ground that the government entrapped the defendants based on "an intolerable degree of governmental participation in the criminal enterprise," without referring to their predisposition to commit the crime.[148] In the course of reaffirming the primacy of the subjective test of entrapment adopted in *Sorrells* and *Sherman*, Justice Rehnquist, writing for the majority, paused to interject the following observation: "While we may some day be presented with a situation in which the conduct of law enforcement agents is so *outrageous* that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . the instant case is distinctly not of that breed."[149] This single off-handed reference explicitly articulated a due process constraint on the government's investigation of criminal activity.

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146. *But see* Paul Marcus, *The Due Process Defense in Entrapment Cases: The Journey Back*, 27 AM. CRIM. L. REV. 457 (1990):

> We should not permit the government to prosecute individuals where the government conduct itself was outrageous or egregious. We should not permit such prosecutions, not because a particular person's rights were violated, but rather because such government activity, in Justice Frankfurter's words, does "more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience."

Id. at 462 (quoting Rochin v. California, 342 U.S. 165, 172 (1952)).

147. 411 U.S. 423 (1973).

148. United States v. Russell, 459 F.2d 671, 673 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973).

149. 411 U.S. at 431-32 (emphasis added).

To support his assertion, Justice Rehnquist cited to the seminal decision of *Rochin v. California*,[150] which held that governmental actions in gathering evidence that "shock the conscience" violate due process.[151] Justice Frankfurter's opinion in *Rochin* recognized the problem with using due process as a means to protect against government overreaching in criminal investigations, asserting that "[w]e are not unmindful that hypothetical situations can be conjured up, shading imperceptibly from the circumstances of this case and by gradations producing practical differences despite seemingly logical extensions."[152] In *Rochin* a majority of the Court encountered such a due process violation when the government forcibly extracted evidence from the defendant's stomach by forcing a tube down his throat after he had swallowed two capsules that contained illegal drugs. The *Rochin* Court found that, although "[t]he faculties of the Due Process Clause may be indefinite and vague . . . we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. *This is conduct that shocks the conscience.*"[153] For all its imprecision, *Rochin* and *Russell*'s acknowledgment of a due process protection putting some outer limit on the government's investigatory power reflected a realistic understanding of the practical role of the judiciary—that one day there may come a case so offensive that no fair-minded judge could abide the government's acts.[154]

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150. 342 U.S. 165 (1952).

151. *Id.* at 172.

152. *Id.* at 174.

153. *Id.* at 172 (emphasis added). Justice Black noted that due process only provided a "nebulous standard," *id.* at 175 (Black, J., concurring), while Justice Douglas stated that application of the majority's approach would "turn not on the Constitution but on the idiosyncrasies of the judges who sit here." *Id.* at 179 (Douglas, J., concurring). Professor Crump aptly described the problem with *Rochin*'s "shock the conscience" test for deciding cases:

> The approach of asking whether the government's conduct is sufficiently "shocking" before condemning it gives a comfortable sense that this test will recognize only compelling cases, leaving a general presumption of deference to the legislature. Thus the *Rochin* test, by focusing upon the government's conduct, seems far removed from the subjectivity of, for example, the importance-to-the-individual approach. But perhaps that is so only because it papers over subjective evaluations of the underlying factors with vague terms such as "conscience," "decency," and one's "sense of justice"—all of which might give free reign to the judge's idiosyncratic prejudices.

David Crump, *How Do the Courts* Really *Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL'Y 795, 880 (1996).

154. *See* John David Buretta, Note, *Reconfiguring the Entrapment and Outrageous Government Conduct Doctrines*, 84 GEO. L.J. 1945, 1977 (1996) ("It is for such extreme situations—when government employs law enforcement power arbitrarily or oppressively—that

However, unlike the application of *Rochin*'s "shock the conscience" test to the forced extraction of evidence, *Russell*'s assertion regarding a conceivable state of affairs was wholly unnecessary to the resolution of the case. Moreover, *Russell*'s acknowledgment of judicial authority, while understandable, proved to be a gremlin in the criminal justice system. Three years later, in *Hampton v. United States*,[155] Justice Rehnquist tried to retract his earlier assertion of judicial authority by contending that *Russell* "ruled out the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case . . . ."[156] Once spoken, however, the apparent recognition of a separate due process right to be free from governmental misconduct in investigating a crime could not be recanted so easily. Justice Rehnquist's plurality opinion in *Hampton* attracted only two other votes; Justices Powell and Blackmun concurred in the judgment, but asserted their unwillingness "to conclude that an analysis other than one limited to predisposition would never be appropriate under due process principles."[157] The three dissenting justices stated similarly that "*Russell* does not foreclose imposition of a bar to conviction—based upon our supervisory power or due process principles—where the conduct of law enforcement authorities is sufficiently offensive . . . ."[158] Although the outrageous government conduct claim was irrelevant to the judgment in *Hampton*, simple addition showed that two concurring plus three dissenting Justices giving generalized support to the *Russell* dictum meant that a majority recognized that the due process analysis—it hardly qualified as a defense—retained some viability. This constitutional protection was distinct from entrapment, yet reflected the view of the dissenting Justices in *Sorrells* and *Sherman* that the government's misconduct should be the focus. Moreover,

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the entrapment and outrageous government conduct doctrines are the judiciary's shield of potential recourse to prevent law enforcers from using their power as a tool of unreasonable, unnecessary oppression."). For example, if a terrorist planted a device that would kill millions, and the government tortured the person to learn its location, would a court permit a prosecution in which the government derived the principle evidence of the crime from the defendant's coerced admission? A court cannot simply abdicate all authority to review the conduct of the government if it may have to countenance a prosecution that is based on evidence obtained through torture. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 173-74 (1982). Judge Calabresi describes the use of "subterfuge" to permit the clash of two absolutes in the law when a clear rule that does not permit torture meets the need to save millions of lives, and "that, like the judge in the torture example, we decide better, in practice, by denying that [subterfuge] ever takes place at all." *Id.* at 175. *See also* JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 100 (1993) ("[I]nterrogation tactics at some undefined point may involve such an assault on the defendant's autonomy and dignity that constitutional intervention, through the vehicle of the due process voluntariness requirement, becomes appropriate.").

155. 425 U.S. 484 (1976).

156. *Id.* at 488-89. Justice Rehnquist's opinion went on to assert: "If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under applicable provisions of state or federal law." *Id.* at 490 (citations omitted).

157. *Id.* at 493 (Powell, J., with Blackmun, J., joining, concurring).

158. *Id.* at 497 (Brennan, J., with Stewart, J. and Marshall, J., joining, dissenting).

unlike the subjective test of entrapment, which is limited to federal prosecutions, the Due Process Clause applies in *every* criminal proceeding, state or federal. Was *Russell*'s slip of the tongue, at least from Justice Rehnquist's perspective, the ultimate victory for the objective view of entrapment? No one knows for sure.

Adding to the confusion surrounding the propriety of this due process protection was *United States v. Payner*,[159] in which a majority of the Court appeared to take back what it apparently provided in *Russell* and refused to rescind in *Hampton*. In *Payner* the defendant objected to a clearly illegal search of a banker's briefcase that revealed the defendant's interest in an offshore bank account. After holding that the defendant did not have standing to raise a third-party's Fourth Amendment claim,[160] the Court rejected the argument that the outrageousness of the government's conduct constituted a due process violation requiring suppression of the evidence in the absence of a violation of an enumerated right of the defendant.[161] Justice Powell, whose concurrence in *Hampton* supported the outrageous government conduct theory, wrote the majority opinion in *Payner*; ironically, Powell's opinion cited the very language from Justice Rehnquist's plurality opinion in *Hampton* that sought to negate the suggestion that due process provided an independent basis for rejecting a conviction because of government misconduct.[162] Did Justice Powell's apparent about-face subtract one of the votes from *Hampton*? Like *Russell* and *Hampton*, *Payner* was not a model of clear judicial analysis: the Court buried its apparent rejection of the outrageous government conduct claim in a footnote at the end of the opinion, and its statement was only dictum because resolution of the issue was unnecessary for the Court's standing analysis.[163]

If outrageous governmental conduct remains the due process standard, then conduct that implicates the supervisory power could arguably be characterized as a violation of the Due Process Clause because anything that undermines the

159. 447 U.S. 727 (1980).

160. *Id.* at 735.

161. *Id.* at 737 n.9.

162. *Id.* ("But even if we assume that the unlawful briefcase search was so outrageous as to offend fundamental 'canons of decency and fairness,' . . . the fact remains that '[t]he limitations of the Due Process Clause . . . come into play only when the Government activity in question violates some protected right of the *defendant*.'" (brackets in original) (quoting Rochin v. California, 342 U.S. 165, 169 (1952); Hampton v. United States, 425 U.S. 484, 490 (1975)) (citation omitted).

163. *See* Schulze, *supra* note 135, at 956 ("As a result of the varying approaches taken by the Supreme Court Justices in *Sorrells*, *Sherman*, *Russell*, *Hampton*, and now *Payner*, the federal courts have been without any settled rules on which to resolve the due process issue. The variety in these courts' interpretations of the state of the defense demonstrate this confusion."); Buretta, *supra* note 154, at 1967 ("The total lack of consistency in the circuits is unsurprising; the Supreme Court has given woefully inadequate definition to the doctrine and the due process principles underlying it.").

integrity of the judicial system might be labeled outrageous.[164] In *Hampton* Justice Brennan's dissent noted that the government's investigatory actions would bar a conviction "based upon our supervisory power or due process principles—where the conduct of law enforcement authorities is sufficiently offensive . . . ."[165] The close connection between due process and supervisory power is further highlighted by the fact that the remedy afforded for prosecutorial misconduct under either analysis is usually the same, dismissal of the indictment. Some lower court decisions, especially in the Ninth Circuit, expressly relied on both due process and supervisory power as *alternative* rationales for dismissing an indictment.[166] Even courts relying only on their supervisory power to police prosecutorial misconduct use the language of

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164. *See* Schwartz, *supra* note 71, at 508-09 ("The lack of clear perimeters often makes it difficult to determine whether [the court] has actually exercised its supervisory power, or instead has based its decision on an alternative ground.").

165. 425 U.S. at 497 (Brennan, J., dissenting).

166. *See* Wang v. Reno, 81 F.3d 808, 819-20 (9th Cir. 1996) (holding that government conduct in attempting to deport a witness back to China to face an almost certain death sentence for giving testimony in the United States for the prosecution was both "a violation of his liberty interest in personal security and thus of his due process rights secured by the Fifth Amendment," and that the "extraordinary nature of the government's misconduct in securing Wang as a prosecution witness . . . counsel in favor of an exercise of supervisory power."); United States v. Marshank, 777 F. Supp 1507, 1524-1524, 1528, 1530 (N.D. Cal. 1991) (dismissing indictment based on government's use of defendant's attorney as an informant about the defendant on, *inter alia*, outrageous government conduct and supervisory power grounds); United States v. Caputo, 633 F. Supp. 1479, 1491 (E.D. Pa. 1986) *rev'd*, 825 F.2d 754 (3d Cir. 1987) (dismissing two counts of a sixteen-count indictment under supervisory power grounds because "the government's conduct in issuing the sham subpoena was improper and amounts to prosecutorial misconduct"); United States v. DeMarco, 401 F. Supp. 505, 514 (C.D. Cal. 1975) (holding that the government must disclose exculpatory evidence to the grand jury, and "[w]hether this duty be based upon the grand jury provisions of the fifth amendment or the due process clause of the fifth amendment, or in the exercise of this court's supervisory jurisdiction, it must be imposed.") (citation omitted).

The tortured history of *United States v. Simpson*, 813 F.2d 1462 (9th Cir. 1987), *rev'd after remand*, 927 F.2d 1088 (9th Cir. 1991), illustrates quite aptly the apparent interchangeability of the due process and supervisory power analysis. The district court in *Simpson* first dismissed the indictment because of outrageous government conduct related to the government's use of an informant, a prostitute, who engaged in sexual relations with the defendant while furnishing information to the government. The Ninth Circuit reversed the lower court, holding that the government's conduct was not outrageous because "our Constitution leaves it of the political branches of government to decide whether to regulate law enforcement conduct which may 'offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically,' but which is not antithetical to fundamental notions of due process." 813 F.2d at 1468 (quoting Rochin v. California, 342 U.S. 165, 172 (1952)). On remand, the district court again dismissed on the basis of its supervisory power, relying on the same conduct that did not rise to the level of a due process violation. Once again, the Ninth Circuit reversed, this time holding that the "supervisory power simply does not give the courts the authority to make up the rules as they go, imposing limits on the executive according to whim or will." United States v. Simpson, 927 F.2d 1088, 1090 (9th Cir. 1991).

outrageous government conduct to support the exercise of judicial authority.[167] For example, in *United States v. Banks*,[168] a federal district court dismissed an indictment with prejudice under its supervisory power because prosecutorial "misconduct formed a pattern throughout the course of the trial [that] leads [the judge] to the belief that this case was not prosecuted in good faith or in the spirit of justice."[169]

That some courts have treated due process and supervisory power as alternative means to reach the same result reflected the Supreme Court's decidedly casual approach in formulating the doctrines. The assertion of the judiciary's supervisory authority sprang forth unexpectedly in *McNabb*, with the Court raising the issue *sua sponte* after rejecting the defendant's Fifth Amendment claim,[170] but not discussing how that authority should be applied in future cases. Similarly, *Russell*'s apparent creation of an outrageous government conduct standard for reviewing indictments was little more than a rhetorical aside and not the product of a principled review of the Due Process Clause.[171] It is not surprising that the unifying theme of both doctrines is preservation of some judicial role in overseeing the government's conduct in the investigatory phase of a case beyond enforcing just the explicit protections of the Fourth and Fifth Amendments. Due process and supervisory power are two sides of the same prosecutorial misconduct coin.

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167. *See* United States v. Taylor, 956 F. Supp. 622, 623 (D.S.C. 1997) ("[T]he totality of the government's actions in these matters rises to the level of *egregious prosecutorial misconduct*, and . . . this is a sufficient finding on which the court can exercise its supervisory power.") (emphasis added), *rev'd sub nom.* United States v. Derrick, 163 F.3d 799 (4th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 1808 (1999). The opposite is also true, as some courts and commentators have used the language of supervisory power to support a "due process" basis for the outrageous government conduct doctrine. *See* Stephen A. Miller, Comment, *The Case for Preserving the Outrageous Government Conduct Defense*, 91 NW. U. L. REV. 305, 345 (1996) (citing *McNabb* for the proposition that the outrageous government conduct doctrine is necessary "to remedy violations of fundamental fairness by law enforcement officials").

168. 383 F. Supp. 389 (D.S.D. 1974).

169. *Id.* at 397. One act that led to the dismissal was the prosecutor's refusal to go forward when the jury fell below twelve members, which was certainly within the government's rights despite the judge's assertion that the prosecutor's reasons for this decision, as expressed to the media, reflected "a violation of the duty of the prosecutor and warrants exercise of this court's supervisory powers." *Id.* In making this determination, the district judge noted the prosecutor's public statement that "he felt that the chances of obtaining a conviction from the remaining jurors were 'slim.'" *Id.* This act was only the final one of many incidences of misconduct cited by the court. Yet, it is unclear why a prosecutor's decision to refuse to proceed with a case and demand a mistrial, which was clearly within the government's rights as a party and is an acceptable strategic decision by an advocate on behalf of the client, should be cited to support the need to invoke a judicial power designed to ensure a civilized proceeding and to protect the integrity of the court. Exercising a right to demand a mistrial that is available to both sides hardly befits partial justification for a remedy dismissing a case and barring any additional proceedings against the defendant.

170. McNabb v. United States, 318 U.S. 332, 340-41 (1943).

171. *See* United States v. Russell, 411 U.S. 423, 431-32 (1973).

These are the odd origins and development of a constitutional protection that has not been discussed by the Supreme Court since *Payner*.[172] Unlike entrapment, which is a jury question, outrageous government conduct is a question of law, and finding such a due process violation should bar the government from even pursuing a criminal prosecution. Justice Rehnquist's opinion in *Russell* warned that "the defense of entrapment... was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve."[173] *Russell*'s off-handed recognition of the outrageous government conduct claim, and its nature as an undefined standard that courts can use to curb questionable investigatory tactics that do not violate explicit constitutional protections, may explain the confusion surrounding its existence and scope. Simply put, divining a standard for deciding what constitutes outrageous government conduct is an exercise in

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172. The Third Circuit's decision in *United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1996), *cert. denied*, 519 U.S. 1047 (1996), dismissed as dictum *Payner*'s apparent rejection of *Russell*, asserting that there was "no reason to doubt that the [Supreme] Court continues to recognize a due process claim premised upon outrageous law enforcement investigative techniques." 89 F.3d at 1064. *See also* Meis, *supra* note 126, at 965 n.86 ("But one hardly can treat [*Payner*'s] aside, tucked away in a footnote, as anything more than dicta [sic]."). It is not clear why "no reason to doubt" exists when the Supreme Court's first word on the subject in *Russell* was dictum, and its last word, while still dictum, plainly rejected reliance on the government's conduct as a separate due process claim. 411 U.S. at 431-32, 435. Although many courts readily accept an "outrageous government conduct" defense as a fully developed constitutional protection, some almost celebrate the fact that it has been used so rarely as to be virtually impossible to prove. For example, in *United States v. Santana*, 6 F.3d 1 (1st Cir. 1993), the First Circuit stated: "The banner of outrageous misconduct is often raised but seldom saluted .... [T]he doctrine is moribund; in practice, courts have rejected its application with almost monotonous regularity." *Id.* at 4. Circuit Judge Selya's opinion then spent the next four pages analyzing whether the government's conduct was sufficiently outrageous to require dismissal of the indictment under due process. Finding that it was not, the First Circuit reinstated the prosecution. For something so infrequently applied, it took considerable judicial effort to reject the defendant's claim.

173. 411 U.S. at 435. Entrapment has not become the "chancellor's foot veto" because the outrageous government conduct claim has been a worthy substitute that permits courts to review the government's conduct of an investigation to decide whether it went too far without enunciating standards or even considering the defendant's predisposition. Judge Easterbrook noted that the "[i]nability to describe in general terms just what makes tactics too outrageous to tolerate suggests that there is no definition—and 'I know it when I see it' is not a rule of any kind, let alone a command of the Due Process Clause." United States v. Miller, 891 F.2d 1265, 1273 (7th Cir. 1989) (Easterbrook, J., concurring). *But see* Marcus, *supra* note 145, at 465:

> Judge Easterbrook misses the mark on why the presence of the defense is important. Its significance lies not in the fact that it will often be successful; it will not. Rather it is important because it creates outer limits on appropriate law enforcement techniques and ... [demonstrates] that courts are indeed willing to draw some lines that cannot be crossed even in pursuit of criminals.

futility.[174]

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174. *See* Buretta, *supra* note 154, at 1966-67 ("*Russell* and *Hampton* have provided only the most general outline of what the outrageous government conduct doctrine means. Whereas the entrapment doctrine is wooden and narrow, the outrageous government conduct doctrine is teflon and ambiguous. Understandably, the circuit courts have had a terrible time applying the doctrine."). In *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), reputed to be the only successful outrageous government conduct case, the Third Circuit overturned convictions after the government enticed the defendants to operate a narcotics laboratory for which undercover agents supplied the necessary materials. *Compare id.* at 381 ("[T]he DEA agents deceptively implanted the criminal design in Neville's mind. They set him up, encouraged him, provided the essential supplies and technical expertise, and when he and Kubica encountered difficulties in consummating the crime, they assisted in finding solutions."), *with id.* at 386 (Adams, J., dissenting) (noting that the similarities between *Twigg* and *Russell* suggest that "government involvement in a similar perhaps even more questionable situation, is not 'outrageous' enough to justify reversal."). In *United States v. Beverly*, 723 F.2d 11 (3d Cir. 1983), however, a different Third Circuit panel found no outrageous government conduct when an undercover agent, aware of the defendants' financial difficulties, proposed an arson scheme in which the agent took the defendants to a service station where the agent bought the gasoline and then drove the defendants to the site. The court was "troubled" by the agents' tactics, *id.* at 11-12, but did not disturb the convictions. In neither *Twigg* nor *Beverly* could the defendants establish an entrapment defense; however, in *Twigg* the defendants were set free, while in *Beverly* the Third Circuit upheld the convictions despite the apparently more egregious actions of the agent who encouraged the defendants to commit the very crime suggested by the government. The standard for outrageous government conduct is not elusive; it is nonexistent.

Aside from *Twigg*, two other circuit court cases decided after *Russell* rely in part on a finding of outrageous government conduct. United States v. Bogart, 783 F.2d 1428, 1436, 1438 (9th Cir. 1986), *vacated in part sub nom. on other grounds*, United States v. Wingender, 790 F.2d 803 (9th Cir. 1986); United States v. Lard, 734 F.2d 1290, 1296-97 (8th Cir. 1984). Another case, *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974), found a due process violation when the prosecutor proceeded to trial knowing that the government's key witness had perjured himself in material matters at the grand jury and subsequently minimized the perjury in representations to the court. *Id.* at 784-85. The court cited neither *Russell* nor *Rochin* in support of its decision.

The haphazard nature of the outrageous government conduct cases is not limited to courts that accept the doctrine. The Sixth Circuit rejected the due process claim in *United States v. Tucker*, 28 F.3d 1420 (6th Cir. 1994), holding that *Payner*'s "clear statement rejecting any 'objective' assessment of the government's conduct, we believe, lays to rest whatever modicum of *Russell*'s dicta may have survived *Hampton*." *Id.* at 1428. Two years after *Tucker*, however, a different panel of the Sixth Circuit held in *United States v. Pipes*, 87 F.3d 840 (6th Cir. 1996), that the investigators' conduct "implicates no due process interests of the defendant, and does not shock the conscience, [so] it cannot bar his conviction." *Id.* at 844. Even though *Pipes* cites *Tucker* with regard to the entrapment defense, the panel failed to notice that *Tucker* clearly rejected the outrageous government conduct claim. Instead, *Pipes* reached the merits of the due process issue and found that the conduct did not cross the line into outrageousness.

The due process analysis has even found its way into sentencing in federal courts. Some circuit courts of appeal have permitted defendants to assert a due process outrageous government conduct claim to show that government agents manipulated the defendant into committing a more serious crime than he intended. A reduced sentence can result. *See* United States v. Naranjo, 52 F.3d 245, 249-51 (9th Cir. 1995); United States v. Barth, 990 F.2d 422, 425 (8th Cir. 1993). The due process claim, at least with regard to sentencing, has been rejected by other courts. *See* United States v. Walls, 70 F.3d 1323, 1329-30 (D.C. Cir. 1995); United States v. Williams, 954 F.2d 668, 673 (11th Cir. 1992). It has also been criticized as an effort to rewrite the federal sentencing guidelines. *See* Jeff LaBine, Note, *Sentencing Entrapment Under the*

C. *Whither the Perjury Trap?*

The outrageous government conduct claim is of dubious origin and appears to exist as a type of judicial placebo, cited as a means of demonstrating the authority of a court to rein in the prosecutor if necessary, but nonetheless more illusory than real. In contrast, entrapment is recognized by all jurisdictions, but its utility may be limited because, at least in federal courts, the defendant's subjective intent is the criterion for a successful assertion of the defense. A defendant who acts voluntarily in choosing to follow a course of conduct that involves a criminal violation, absent repeated or overbearing government entreaties, will be unlikely to succeed on either an entrapment or an outrageous government conduct claim—which brings us back to the perjury trap: Is it a type of entrapment, a form of the outrageous government conduct claim, or something else altogether?

If the perjury trap is entrapment, then the claim seems doomed to failure absent a prosecutor telling a witness to lie. In almost all cases, the defendant will have a choice whether to lie, testify truthfully, or assert her Fifth Amendment privilege before the grand jury. However, as the Supreme Court noted in *United States v. Mandujano*,[175] while a witness called to testify before a grand jury is "free at every stage to interpose his constitutional privilege against self-incrimination . . . perjury was not a permissible option."[176] In a similar vein, the Court stated in *Nix v. Whiteside*[177] that "[w]hatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*."[178] Because witnesses are required to testify truthfully, a prosecutor's decision to call a witness before the grand jury would not likely be an inducement to criminal conduct. Even a defendant who knows that she is likely to be indicted may not commit perjury,[179] so the witness's knowledge of the government's reason for seeking the testimony is irrelevant to whether the government acted improperly.

If there remains any meaning to the outrageous government conduct claim, it too is an unlikely basis for defending against perjury charges. If the grand jury is validly constituted and the subject matter of the witness's testimony within its jurisdiction, then the prosecutor's motives are irrelevant. Since *Costello*, lower courts cannot review the grand jury's reception of evidence and

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Federal Sentencing Guidelines: Activism or Interpretation?, 44 WAYNE L. REV. 1519, 1553 (1998) ("[M]anipulation of the Guidelines goes beyond interpreting the Guidelines to materially rewriting them—a power that has been specifically delegated to the [Sentencing] Commission and not to the judiciary.").

175. 425 U.S. 564 (1976).

176. *Id.* at 584.

177. 475 U.S. 157 (1986).

178. *Id.* at 158 (emphasis added).

179. *See* United States v. Washington, 431 U.S. 181, 189 (1977) ("It is firmly settled that the prospect of being indicted does not entitle a witness to commit perjury. . . .").

decision to indict. An outrageous government conduct claim based on the prosecution impermissibly creating a perjury trap is just such a review that looks at the type of evidence received by the grand jury and its reasons for finding probable cause.[180] The prosecutor's conduct is not subject to any more review than the grand jury's, so whatever life the outrageous government conduct claim might have, it appears to be completely inapplicable to conduct before the grand jury.

A perjury trap claim is really a defendant's explanation for lying that seeks to explain it away by focusing attention on the questioner. The stumbling block is that those who testify falsely work a significant harm by interfering with the investigatory process; thus prosecutors bringing perjury charges are protecting an important function of the criminal justice system. The perjury trap claim reflects the fundamental problem with the outrageous government conduct claim. For all its appeal as a means to protect against the truly egregious case of governmental overreaching, relying on due process gives courts a "chancellor's foot veto" to impose their own view of what is permissible in conducting an investigation. The irony is obvious—a test tracing its origins to the "objective" view of entrapment is at its core an expression of the subjective view of judges. A prosecutor's decision to compel a witness to appear before a grand jury, if the subsequent false testimony is used to convict the witness of perjury, is not somehow made wrongful because a judge believed it to be improper. Perjury statutes provide a basis to defend against the indictment on the ground of materiality,[181] and a defendant can raise the entrapment defense at trial, even if she is unlikely to succeed.[182] Moreover, the Constitution furnishes important constraints on the investigatory phase of a case, through the protections of the Fourth Amendment for searches and seizures and the Fifth Amendment privilege against self-incrimination. When the government uses the tools provided to investigate criminal activity, their use in a legal manner seems to comport with due process, not contravene it. Due process should not

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180. *See, e.g.*, Costello v. United States, 350 U.S. 359, 363 (1956) ("An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits.").

181. For example, the federal perjury statute covers any person who testifies or submits a written declaration under oath that "states or subscribes any *material* matter which he does not believe to be true." 18 U.S.C. § 1621 (1994) (emphasis added). Similarly, the common law of perjury incorporated materiality as an element of the crime. *See* Lisa C. Harris, Note, *Perjury Defeats Justice*, 42 WAYNE L. REV. 1755, 1761 (1996).

182. Even if the defense does not meet the technical requirements for entrapment, an appeal to the jury's sympathy by portraying the government as pursuing an unfair course of conduct is not impossible. The Independent Prosecutor's prosecution of Julie Hyatt Steele on obstruction of justice and false statement charges, relating to the investigation of President Clinton's alleged sexual harassment of a female staff member, involved the defense assertion in closing argument that the defendant "was an innocent victim of [Independent Counsel] Starr's determination to pursue the President." Leef Smith & Patricia Davis, *Jury Deadlocks on Steele Charges; Mistrial Is 2nd Recent Setback for Starr in White House Probe*, WASH. POST, May 8, 1999, at A7.

supply a separate standard of conduct that can transform a prosecutor's otherwise permissible actions into a violation of the defendant's constitutional rights.

D. The Right to a Grand Jury Indictment

The Supreme Court in *Russell* announced that there might one day be a case in which outrageous government conduct would require dismissal of an indictment.[183] In much the same fashion, while *Mechanik*, *Bank of Nova Scotia*, and *Williams* eliminated supervisory power as a means of policing prosecutorial conduct before the grand jury, the Court did not renounce entirely the authority to provide a remedy in a case involving prosecutorial misconduct. For example, in *Bank of Nova Scotia* the Court preserved at least the glimmer of judicial review of misconduct affecting the grand jury's decision to indict when it stated: "Finally, we note that we are not faced with a history of prosecutorial misconduct, spanning several cases, that is so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process which resulted in the indictment."[184] Just like its dictum in *Russell*, the Court could not forswear at least the appearance of having a role in reviewing a federal prosecutor's conduct before the grand jury, even while observing that such "systematic and pervasive" abuse was not present in *Bank of Nova Scotia*.

Similarly, in *Williams* the Court asserted that its analysis in *Bank of Nova Scotia*

> makes clear that the supervisory power can be used to dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those "few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions."[185]

Williams eliminated the federal judiciary's authority to prescribe rules of conduct for prosecutors appearing before the grand jury, so the supervisory power noted by the Court must be so limited that it would only apply to violations undermining the essential function of the grand jury itself. If that is the extent of the judiciary's authority, then it is no different from the Fifth Amendment's requirement that the defendant be indicted by an unbiased grand

183. 411 U.S. 423, 431 (1973).
184. 487 U.S. 250, 259 (1988).
185. 504 U.S. 36, 46 (1992) (quoting United States v. Mechanik, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring)).

jury.[186]

The only real constraint on prosecutorial conduct before the grand jury is not the judiciary's supervisory power or the outrageous government conduct claim under due process (*Williams*'s statement notwithstanding) but instead the constitutional guarantee that the defendant be indicted by a grand jury for all capital and other infamous crimes.[187] *Costello* ruled out any inquiry into the substance of the grand jury's decision to indict so long as it was an "indictment returned by a legally constituted and *unbiased* grand jury . . . ."[188] The Court has held that when "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair," then a court can presume prejudice.[189] Exclusion of citizens from service on a grand jury on the basis of race or sex comprises the type of structural flaw that permits a presumption of prejudice requiring dismissal of an indictment, without prejudice to reindictment of the defendant by a properly constituted grand jury.[190] For the type of violation described in *Bank of Nova Scotia* and *Williams* to permit dismissal of the indictment, the prosecutor's actions must have undermined the independence of the grand jury to such a degree that its probable cause determination was not the result of a detached review of the evidence, but instead only a forfeiture of its authority to the government.[191]

When is a grand jury no longer independent of the prosecutor? A court

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186. Some lower court opinions appear to blend supervisory power and grand jury independence analysis. In *United States v. Martin*, 480 F. Supp. 880 (S.D. Tex. 1979), a district court dismissed an indictment in part because "this Court strongly feels that the indicting grand jury here was used to rubber stamp the wishes of the prosecutors in derogation of its duty to stand as an independent body placed between the prosecutor and the accused." *Id.* at 886. In *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979), the district court dismissed the indictment based in part on the ground that the prosecutor apparently showed a copy of the indictment signed by the United States Attorney to the grand jurors before they voted, noting that "[t]his kind of conduct by government attorneys makes a mockery of the grand jury system." *Id.* at 1355. In neither *Martin* nor *Gold*, both decided before *Hasting*, did the district courts focus on whether the prosecutors' conduct prejudiced the defendant. The approach that addresses primarily the government's misconduct is closer to supervisory power or outrageous government conduct than a Fifth Amendment analysis that considers the independence of the grand jury.

187. U.S. CONST. amend. V ("No person shall beheld to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .").

188. 350 U.S. 359, 363 (1956) (emphasis added).

189. *Bank of Nova Scotia*, 487 U.S. at 257.

190. *See, e.g.*, Vasquez v. Hillery, 474 U.S. 254 (1986) (dismissing indictment due to exclusion from serving on grand jury on the basis of race); Ballard v. United States, 329 U.S. 187 (1946) (dismissing indictment due to exclusion of women from grand jury service).

191. *See* United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1391 (9th Cir. 1983) ("Dismissal of an indictment is . . . warranted on constitutional grounds if prosecutorial misconduct has undermined the grand jury's ability to make an informed and objective evaluation of the evidence presented to it."); *see also* United States v. Red Elk, 955 F. Supp. 1170, 1182-83 n.12 (D.S.D. 1997) ("[I]t appears that the right to unbiased treatment by a grand jury is really one grounded in the Grand Jury Clause of the Fifth Amendment. Because the grand jury's determination is a preliminary one . . . courts have not been inclined to extend due process rights to grand jury proceedings.").

trying to answer that question must confront *Costello*'s admonition that a facially valid indictment precludes judicial review of the quality of the evidence on which the grand jury relied to decide probable cause. If the sufficiency of the evidence cannot be examined, then the determination of independence must involve a review of the prosecutor's conduct in the actual grand jury proceeding. In *United States v. Breslin*[192] the district court dismissed an indictment without prejudice because "misconduct from the first day the grand jury met continuing through the day the superseding indictment was presented" compromised the integrity of the grand jury.[193] The court identified a number of instances of prosecutorial misconduct, including statements which implied that the grand jury needed to act quickly to avoid the expiration of the statute of limitations and that the grand jurors need not agree to everything in the indictment, only the "critical" parts.[194] The court included as a factual basis for dismissing the indictment the fact that the prosecutor provided donuts to the grand jurors at their first meeting, an act characterized as a technique "to curry favor with the grand jurors and lead them to abrogate their role as unbiased factfinders."[195] Prosecutorial pressure to respond quickly might constitute a basis to question a grand jury's independence, but bringing a box of donuts is not the type of threat to grand jury independence that creates a "grave doubt" about the decision to indict. Yet, the question of independence has to be free from reviewing the manner in which the prosecutor gathered and presented evidence to the grand jury, so courts trying to assess whether the prosecutor acted properly are left with such crumbs to make their decision.[196]

The Fifth Amendment grand jury right, which is not applicable to the states,[197] prevents overt usurpation of the grand jury's function by the prosecutor. Regardless of the prosecutor's intent, undermining the independence of the grand jury means that the defendant should not have been indicted for the crime by that body. Yet, an allegation that prosecutorial misconduct resulted in a breakdown in the grand jury's proper functioning should not provide a backdoor means for courts to impose rules to constrain prosecutorial conduct under the rubric of finding that the prosecutor compromised the grand jury's independence. A court cannot, for example, conclude that the government's failure to furnish exculpatory evidence to the

192. 916 F. Supp. 438 (E.D. Pa. 1996).
193. *Id.* at 446.
194. *Id.* at 442.
195. *Id.* at 443.
196. Dismissal of the indictment on Fifth Amendment grounds does not end the case, however, because another grand jury untainted by the prosecutorial misconduct can reindict the defendant, as happened in *Breslin*. *See* United States v. Breslin (Breslin II), No. 95-cr-202, 1997 WL 50422, at *1 (E.D. Pa. Feb. 7, 1997) (denying defendant's motion to dismiss indictment returned after dismissal of previous indictment due to Fifth Amendment violation).
197. *See* Hurtado v. California, 110 U.S. 516, 538 (1884) (concluding that Due Process Clause does not require the states to charge a defendant by a grand jury indictment even if the crime is "infamous").

grand jurors undermined the structural independence of the grand jury[198]—that approach simply bypasses the Supreme Court's limitations on the use of supervisory power by attaching a different label to the court's action.

The judiciary's need to assert that it retains at least some residual authority to review the conduct of the prosecutor in the grand jury is the reason why the Court acknowledged in *Bank of Nova Scotia* and *Williams* that recurrent abuses of the grand jury process can empower the judiciary to put a halt to prosecutorial misconduct. The source of that authority is unclear, given the Court's rejection of supervisory power as a means to police conduct occurring outside the direct purview of the judiciary. Like *Russell*, the Court's dictum regarding this residual authority protects it from having to disavow any possibility of reviewing the conduct of prosecutors. However, that authority—if it can even be called that—is quite limited because the Court does not permit judicial inquiry into the prosecutor's conduct before the grand jury or permit judges to exercise a "chancellor's foot veto" over the government because of its attorney's motives or tactics, absent a separate constitutional violation.

IV. CONTROLLING PROSECUTORIAL MISCONDUCT THROUGH SUBSEQUENT PROCEEDINGS

The Supreme Court has eliminated direct judicial review of prosecutorial misconduct in the proceeding in which the misconduct occurred. If a grand jury indicts a defendant, the only means of seeking vindication is a trial in which a jury or a judge determines whether the government introduced proof beyond a reasonable doubt that the defendant committed a crime. Until recently, a defendant that believed she had been prosecuted unfairly and was found not guilty had no civil remedy, such as a damages action, to challenge the prosecutor's conduct. While an aggrieved defendant can pursue the common law tort of malicious prosecution against a complaining witness or police officer that fabricated evidence, prosecutors are absolutely immune from civil liability for initiating and pursuing the case.[199] Similarly, state and federal prosecutors have absolute immunity from constitutional tort actions arising from their conduct in the judicial phase of a case, which includes all conduct before the grand jury.[200] As members of the bar, prosecutors are subject to the

198. *See, e.g., Breslin II*, 1997 WL 50422, at *10 (citing *United States v. Williams*, 504 U.S. 36, 52 (1992), for this proposition).

199. *See* RESTATEMENT (SECOND) OF TORTS § 656 (1977) ("A public prosecutor acting in his official capacity is absolutely privileged to initiate, institute, or continue criminal proceedings.").

200. The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1994), provides a remedy against state officials who violate a person's federal constitutional or statutory rights. Prosecutors historically have absolute immunity from civil actions resulting from their misconduct; however, the scope of this absolute immunity is limited. *See* Kalina v. Fletcher, 522 U.S. 118, 129-31 (1997) (noting that a prosecutor's conduct in the preparation and filing of documents was protected by absolute immunity under § 1983, but holding that a prosecutor was not entitled to

disciplinary rules of the state in which they are admitted to practice, but bar proceedings do not provide any direct compensation to a vindicated defendant.

Proposals to reform the grand jury focus largely on ways to lessen the prosecutor's control over the proceeding as an indirect means of addressing prosecutorial misconduct. One recommendation is to give the grand jurors independent legal counsel and thereby eliminate the jury's reliance on the prosecutor's legal advice—advice possibly tied to the prosecutor's stake in the outcome of the proceeding.[201] The thought is that an attorney with no ties to the prosecutor's office will guide the grand jury to a fairer charging decision. Senator Bumpers submitted two bills in 1998 that would have amended the Federal Rules of Criminal Procedure to permit subpoenaed witnesses to have their own attorneys present in the grand jury room, the theory being that the outside attorney would monitor the prosecutor's conduct.[202] Even before the Supreme Court's decision in *Williams*, Professor Peter Arenella advocated requiring prosecutors to submit exculpatory evidence to the grand jury.[203]

The problem with reforms that seek to empower the grand jurors to act independently of the prosecutor is twofold. First, they reflect at least an implicit assumption that lessening the prosecutor's role in the grand jury process will result in fewer—or perhaps better—indictments, which in turn is considered a benefit to the criminal justice system. This assumption reflects a view that a

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absolute immunity where she made an affirmation of a fact in order to establish probable cause); Buckley v. Fitzsimmons, 509 U.S. 259, 272-73 (1993) (stating that prosecutors are entitled only to qualified immunity when performing administrative or investigatory duties that do not relate to preparing for initiation of prosecution, and absolute immunity is reserved for the prosecutor's role as advocate for the state); Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976) (holding that a prosecutor who acted within the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the state's case was absolutely immune from civil suit for damages under § 1983 for alleged deprivations of the accused's constitutional rights); Morley v. Walker, 175 F.3d 756, 759 (9th Cir. 1999) (stating that when a prosecutor is engaged in "traditional prosecutorial functions"—those activities closely associated with the judicial phase of the criminal process—then absolute immunity will prevail; however, if the activities are merely administrative or investigatory, then qualified immunity reigns.).

201. *See* Renée B. Lettow, Note, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333, 1361 (1994) ("An important reason why the grand jury has lost ground compared to judges, prosecutors, and legislators is its lack of staff. Counsel is particularly important."); *see also* Beall, *supra* note 21, at 636 ("[S]pecial grand juries should be provided with counsel, a 'jury clerk' much like the current judicial clerk.").

202. S. 2289, 105th Cong. § 2 (1998); S. 2030, 105th Cong. § 2 (1998); *see* Hafetz & Pellettieri, *supra* note 23, at 14 (advocating that witnesses be permitted to have counsel in the grand jury proceedings). Representing the contrary view, Earl Silbert, a former United States Attorney for the District of Columbia, assailed an earlier ABA proposal to permit witnesses to bring their counsel into the grand jury proceeding. Wary of abuses by defense attorneys in unmonitored proceedings and apprehensive of conflicts created by attorneys representing multiple parties before the same grand jury, Silbert argued that "[t]he danger to the grand jury's truth seeking, investigative function is far too great." Earl J. Silbert, *Defense Counsel in the Grand Jury—The Answer to the White Collar Criminal's Prayers*, 15 AM. CRIM. L. REV. 293, 300 (1978).

203. *See* Arenella, *supra* note 19, at 565-69.

properly functioning body would issue fewer indictments. However, simply producing a lower indictment rate would not address the problem of prosecutorial misconduct in the grand jury. Moreover, making the process more formal, by giving a grand jury separate legal counsel and requiring the introduction of certain types of information, would slow the process without demonstrably decreasing the possibility that the grand jury would indict an innocent person. Reducing the likelihood of an indictment or limiting the efficacy of the grand jury as an investigative tool would certainly be appealing to targets of investigations, but such changes would not necessarily be positive developments in the criminal process.[204]

The second problem with the suggested reforms that focus on refining the grand jury's accusatory role is that they ignore the core issue of making prosecutors accountable for their misconduct. Prosecutorial control of the investigation, standing alone, is not inherently problematic, even in a system in which the Supreme Court has precluded judicial review of the grand jury's investigatory and accusatory functions. The possibility of misuse of that authority, however, requires that there be some means of judicial scrutiny that does not automatically provide every defendant with a vehicle to challenge the government's conduct. As the Supreme Court's decisions since *Costello* demonstrate, seeking judicial review of the grand jury investigation can devolve into a tactic to delay the prosecution of valid criminal charges.[205] The criminal justice system is already rife with procedural delays, and providing a means for a defendant to further prolong the proceedings does not make the grand jury right any more meaningful.

In the past two years, Congress has enacted two laws that address the issue of prosecutorial misconduct. The first was the Hyde Amendment,[206] which gives vindicated defendants in federal prosecutions the right to seek attorney's fees from the government. The second was the McDade Act,[207] which makes federal prosecutors subject to the disciplinary rules in every state in which they practice. These two acts are first steps that, while flawed in some ways, provide an avenue to address prosecutorial misconduct claims in a proceeding separate from the underlying criminal prosecution. These provisions are certainly not the final, nor even the best, methods to address the problem of prosecutorial misconduct. But they do indicate how Congress and the state legislatures should approach the issue.

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204. *See* Leipold, *supra* note 24, at 313 ("If we accept that grand jury proceedings will never resemble a full trial—and more specifically, will never be adversarial—there is little chance that they will ever be a meaningful deterrent to the prosecutor.").

205. *See* Bank of Nova Scotia v. United States, 487 U.S. 250, 254-65 (1988); United States v. Washington, 431 U.S. 181, 185-88 (1976); United States v. Dionisio, 410 U.S. 1, 1-18 (1972).

206. Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (to be codified at 18 U.S.C. § 3006A).

207. Pub. L. No. 105-277, § 801(a), 112 Stat. 2681 (1998) (to be codified at 28 U.S.C. § 530B).

A. The Hyde Amendment

At the urging of Representative Henry Hyde, chair of the House Judiciary Committee, Congress enacted a provision that, for the first time in criminal prosecutions, permits a defendant vindicated after an indictment to seek recovery of attorney's fees. The proposal originated in a bill that would have allowed members of Congress and their respective staffs to recover their attorney's fees following a criminal acquittal. That bill grew out of dissatisfaction with the prosecution of Representative Joseph McDade.[208] However, Representative Hyde offered a program that went beyond just providing compensation to members and staff of the legislative branch; Hyde's proposal offered to pay the attorney's fees of any "prevailing party" in any case in which the government's position was not "substantially justified."[209] The "substantially justified" standard came from the Equal Access to Justice Act (EAJA), which permits private parties to recover attorney's fees in civil litigation in which they prevail over the federal government, "unless the court finds that the position of the United States *was substantially justified* . . . ."[210] Representative Hyde argued in favor of his bill that "[i]t may be rough justice, but it is substantial justice. That is what we are attempting to do."[211]

The House of Representatives added Hyde's proposal as an amendment to a larger budget bill. After both chambers passed the bill, a Conference Committee reconciled the differences in the legislation, including a substantial revision of the fee-shifting provision. The most important change to emerge from the legislative compromise was the adoption of a different standard for recovery by defendants in criminal cases, requiring the claimant to prove that the government's position was "vexatious, frivolous, or in bad fath . . . ."[212] The final version of the provision provides as follows:

> During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the

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208. *See* 143 CONG. REC. H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde) ("Now, in the bill, the gentleman from Pennsylvania [Mr. Murtha] having in mind the case of someone we all know who went through hell, if I may use the term, for many years of being accused and finally prevailed at enormous expense, one he will never get out from under . . . .") (referring to the prosecution of Rep. McDade); *cf.* Bill Moushey, *Murtha Seeking Prosecutor Limits*, PITTS. POST-GAZETTE, Feb. 3, 1999, at A1 (discussing Rep. Murtha's "assault on overzealous and lawbreaking officials in the U.S Department of Justice. . ." after the acquittal of Rep. McDade on bribery and RICO charges).

209. H.R. 2267, 105th Cong. § 616 (1997). Rep. Hyde said about the bill, "First of all, it is too narrow. It only covers Congressmen and congressional staff. If it is good enough for them, it ought to be good enough for any citizen." 143 CONG. REC. H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde).

210. 28 U.S.C. § 2412(d)(1)(A) (1994) (emphasis added).

211. 143 CONG. REC. H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde).

212. Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (to be codified at 18 U.S.C. § 3006A (Supp. 1998)).

> defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act, may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code. To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal. Fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision.[213]

The Hyde Amendment, which relies on the procedures of the EAJA for determining whether a defendant is qualified to seek reimbursement,[214] does not

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213. *Id.*

214. The procedural requirements for filing a claim under the EAJA are as follows:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed.

28 U.S.C. § 2412(d)(1)(B) (1994). The EAJA generally caps the attorney's fees at $125 per hour, § 2412(d)(2)(A)(ii) (Supp. 1998), and limits who can seek recovery based on the financial assets of the claimant:

> (2) For the purposes of this subsection—
>
> . . .
>
> (B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more

permit a claim for damages against an individual prosecutor. In that sense, it retains the common law immunity provided to prosecutors for the tort of malicious prosecution. On the other hand, the provision allows recovery in a broader range of cases than would be available for the common law tort, which requires that the acquitted defendant prove that there was no probable cause to support the prosecution.[215] The Conference Report accompanying the resolution that included the Hyde Amendment asserts that "[t]he conferees understand that a grand jury finding of probable cause to support an indictment does not preclude a judge from finding that the government's position was vexatious, frivolous or in bad faith."[216] While the Supreme Court in *Costello* prevented judicial inquiry into the adequacy of the evidence for an indictment, the congressional intent in approving the new fee-shifting regime adopts a parallel approach by preventing the issuance of a grand jury indictment from foreclosing judicial inquiry into the propriety of the government's conduct. Were it otherwise, the Hyde Amendment would be a nullity because the mere

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> than 500 employees at the time the civil action was filed; except that an organization described in § 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of Title 5 . . . .

§ 2412(d)(2)(B) (Supp. 1998). Unlike most civil cases, in which a private party pays its own costs for asserting a claim or defending against the government's action, criminal prosecutions sometimes involve both a corporation and its officers or directors as defendants, or conduct by individuals on behalf of the entity. In those situations, the corporation often undertakes the obligation to pay the attorney's fees of the individuals, and the articles of incorporation and the bylaws may make the payment of such costs mandatory. For example, Delaware law provides:

> To the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding . . . or in defense of any claim, issue or matter therein, such person *shall be indemnified* against expenses (including attorney's fees) actually and reasonably incurred. . . .

DEL. CODE ANN. tit. 8, § 145(c) (Supp. 1998) (emphasis added). An interesting question under the Hyde Amendment will be whether those officers who have the right to payment of their legal costs by the corporation could first seek recovery from the government, and then seek reimbursement from the corporation of any costs not covered by the Hyde Amendment award. If an individual would have qualified under the EAJA standards to recover attorney's fees, but the corporation would not have, the corporation could seek recovery by taking over the claim of the individual defendant vindicated in the prosecution under a subrogation theory. Another approach may be for a corporation to condition its payment of attorney's fees for an officer on the individual defendant's agreement to pursue a Hyde Amendment claim and use any recovery to repay the corporation.

215. *See* 52 AM. JUR. 2D *Malicious Prosecution* § 6 (1970).

216. H.R. REP. NO. 105-405, at 194 (1997).

fact of a valid indictment would prevent any claim for attorney's fees.

Unfortunately, the Conference Report's negative reference to the effect of a grand jury indictment is the only guidance in the legislative history on the meaning of the statute. The remainder of the Report's discussion of the new provision simply reiterates the language of the statute, and the floor debate concerned the earlier version of the bill that would have permitted recovery whenever the government's position was not "substantially justified."[217] While Representative Hyde's floor statements advocated his proposal to transplant the EAJA to the criminal arena, the compromise version of the statute that emerged from the Conference Committee contains significant changes that make it quite different from the EAJA civil fee-shifting provision. The most important revision was the movement from the EAJA requirement of a "substantially justified" basis for the suit to a determination of whether the government's position was "vexatious, frivolous, or in bad faith."[218] Moreover, the new provision shifts the burden of proof to the party seeking attorney's fees to demonstrate that the government's conduct meets—or perhaps more accurately falls below—the statutory standard, so that the prosecution begins with a presumption of regularity despite the defendant having prevailed in the criminal case. The legislative history is barren of any direct reference to what constitutes conduct or a position that is vexatious, frivolous, or in bad faith. While Representative Hyde's floor statements on the need for a fee-shifting provision show congressional awareness of the rationale for the law, they are not helpful for interpreting the meaning of the terms because that language was not at issue. Congress effectively delegated to the courts the responsibility for defining the parameters of the new statute, especially the determination of what types of misconduct meet the standard for an award of attorney's fees.

Only a handful of cases have considered attorney's fees claims under the Hyde Amendment, but they show a clear trend toward a flexible, wide-ranging interpretation of what types of conduct can be considered for an award of attorney's fees. While the language of the statute applies to the government's "position" in "any criminal case,"[219] preindictment conduct of both the prosecutor and investigators has been reviewed under a Hyde Amendment claim even though it precedes the commencement of formal criminal proceedings. For example, in *United States v. Holland*[220] the district court assessed the vexations or frivolous nature of the government's claim from the time of a criminal referral by the Federal Deposit Insurance Corporation to the United States Attorney.[221] In awarding over $500,000 in attorney's fees to the defendants, the district court found that the decision to pursue the criminal case

217. 143 CONG. REC. H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde).

218. 18 U.S.C. § 3006A (Supp. 1998).

219. *Id.*

220. 34 F. Supp. 2d 346 (E.D. Va.), *vacated in part on reconsideration by* 48 F. Supp. 2d 571 (E.D. Va. 1999).

221. *Id.* at 364.

was politically motivated and that the prosecution should not have relied on the testimony of its principal witness, who the court found to be "incredible as a matter of law."[222] Similarly, in *United States v. Gardner*[223] the trial court considered the conduct of both the prosecutor and the Internal Revenue Service in the course of an investigation of the defendant in deciding the request for attorney's fees.[224] Trial conduct, involving the prosecutor's failure to disclose exculpatory evidence to the defendant as required by the Due Process Clause,[225] was the basis for an award of attorney's fees in *United States v. Ranger Communications, Inc.*[226]

The Hyde Amendment does not permit defendants to recover whenever a jury or judge finds in their favor, although that is certainly a precondition for a successful motion.[227] The vindicated defendant must go a step further by demonstrating misconduct by the prosecutor or investigator that substantially affected the decision to proceed with the case or that infected the proceedings. Prosecutorial misconduct is not limited to intentional actions, and the statutory standard is broad enough to encompass grossly negligent conduct. The Hyde Amendment is not limited to situations that would meet the requirements of the tort of malicious prosecution, such as requiring proof of a lack of probable cause to indict or of actual malice, although evidence along those lines would go a long way toward demonstrating the government's position was vexatious, frivolous, or in bad faith. Moreover, the timing of the misconduct, whether it occurs before or after an indictment, should be irrelevant to a Hyde Amendment claim once the defendant has been vindicated. The Conference Committee Report indicates that Congress did not view an otherwise valid grand jury indictment as precluding recovery,[228] so it would be illogical to look only at the prosecutor's conduct *after* that point in deciding whether to award attorney's fees.

While the standard is flexible, the scope of the Hyde Amendment needs to be worked out carefully by the courts, which must be mindful not to interfere in grand jury investigations. In that regard, one interpretive issue courts must address is determining whether a claimant is a "prevailing party" in a "criminal

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222. *Id.* at 366 n.34. The judge granted the defendant's motion for a judgment of acquittal at the end of the prosecution's case. *Id.* at 375.

223. 23 F. Supp. 2d 1283 (N.D. Okla. 1998).

224. *Id.* at 1294-95. The court found that the defendant had established a sufficient basis to order discovery of the government's reasons for proceeding with an indictment, which the court dismissed with prejudice before trial due to a lack of sufficient evidence. *Id.* at 1296-97.

225. U.S. CONST. amend. V.

226. 22 F. Supp. 2d 667, 676 (W.D. Mich. 1998).

227. *See* United States v. Reyes, 16 F. Supp. 2d 759, 761 (S.D. Tex. 1998) (granting summary judgment to government when "[a]t most, [defendant] relies on the Court's granting of the judgment of acquittal as support for his motion for attorney's fees."); United States v. Triosi, 13 F. Supp. 2d 595, 597 (N.D. W. Va. 1998) ("[A]cquittal alone does not automatically entitle [defendant] to compensation under the statutory scheme.").

228. 143 CONG. REC. H7791 (daily ed. Sept. 24, 1997).

attorney's fees for subjects of grand jury investigations, as it did under the Independent Counsel law for those that were not indicted.[236] The Hyde Amendment authorizes a form of judicial review of the prosecutor's conduct in the grand jury, but it does not appear from the language of the statute that Congress intended to create a means for courts to engage in that type of review during an investigation, or when the grand jury does not act. Indeed, if the grand jury decides not to indict or the prosecutor discontinues an investigation, these actions indicate quite the opposite of the situation the Hyde Amendment addresses, which is prosecutorial misconduct. Allowing an application for attorney's fees when the prosecutor or grand jury exercises its discretion not to pursue a criminal case creates an odd incentive that encourages a prosecutor to pursue a questionable case by seeking an indictment, or drop an investigation at an early stage if there is any question that it may not be fruitful. The congressional scheme should not be interpreted to discourage reasonable law enforcement efforts, but should provide a means to police prosecutorial misconduct that falls to the level of being "vexatious, frivolous or in bad faith."[237]

Claims under the Hyde Amendment to this point have generally involved white collar criminal charges, including bank fraud,[238] import violations,[239]

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236. The Independent Counsel law provides as follows:

> Upon the request of an individual who is the subject of an investigation conducted by an independent counsel pursuant to this chapter, the division of the court may, if no indictment is brought against such individual pursuant to that investigation, award reimbursement for those reasonable attorney's fees incurred by that individual during that investigation which would not have been incurred but for the requirements of this chapter. The division of the court shall notify the the [sic] independent counsel who conducted the investigation and Attorney General of any request for attorney's fees under this subsection.

28 U.S.C. § 593(f)(1) (1994). Attorney's fees are only permitted if the defendant is not indicted by the grand jury. *In re* North, 37 F.3d 663, 664 (D.C. Cir. 1994). A person who received a presidential pardon after being indicted could not seek attorney's fees under the law. *In re* North, 62 F.3d 1434, 1438 (D.C. Cir. 1994). Under this fee provision, over four million dollars has been awarded for attorney's fees. Kathleen Clark, *Paying the Price for Heightened Ethics Scrutiny: Legal Defense Funds and Other Ways That Government Officials Pay Their Lawyers*, 50 STAN. L. REV. 65, 106 (1997). Prior to the adoption of the Hyde Amendment, Congress authorized the payment of attorney's fees to a defendant acquitted of charges related to the White House Travel Office. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 526, 110 Stat. 3009 (1996) (approving payment of $500,000 for legal fees of Billy Dale and five other former employees of Travel Office).

237. Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (to be codified at 18 U.S.C. § 3006A).

238. United States v. Holland, 34 F. Supp. 2d 346 (E.D. Va. 1999).

239. United States v. Ranger Elec. Communications, Inc., 22 F. Supp. 2d 667 (W.D. Mich. 1998).

case."[229] The EAJA only defines the term "prevailing party" with reference to an eminent domain action,[230] and the statute provides no definition of "criminal case." While most cases will be clear because a defendant was acquitted or the court dismissed the charges, an open issue under the Hyde Amendment is whether it applies only to those who have been vindicated after an indictment, which is the point at which the formal criminal proceeding begins. For example, suppose that a person who was the target of a grand jury investigation incurred attorney's fees, and the government subsequently decided not to pursue the case or the grand jury refused to indict the person. In *In re Grand Jury Subpoena Duces Tecum (Viglianco)*,[231] the district court held that a motion to quash a grand jury subpoena was a "criminal case" within the meaning of the Hyde Amendment, although it refused to award attorney's fees because the government's position did not meet the statutory standard.[232]

Viglianco's extension of the Hyde Amendment[233] is troublesome, and probably wrong. Congress adopted the attorney's fee provision not only to give vindicated defendants a means of redress, but also to police prosecutorial misconduct by holding it up to the light of judicial scrutiny after the completion of the criminal process. The Hyde Amendment is consistent with the Supreme Court's approach to grand jury investigations in cases beginning with *Costello*.[234] That approach has consistently been to admonish courts not to interfere in the grand jury's investigative function by reviewing the prosecutor's conduct. Just as *Costello*[235] and its progeny deny defendants a means to challenge the prosecutor's actions in gathering evidence and presenting it to a grand jury by seeking dismissal of an indictment, so too the Hyde Amendment only applies after the criminal process is complete, so that judicial review is not a form of "chancellor's foot veto" over the government. Permitting courts to consider an attorney's fee application *during* a grand jury investigation is precisely the sort of judicial interference the Supreme Court prohibited. Significantly, Congress did not clearly authorize a claim for

229. 18 U.S.C. § 3006A (Supp. 1998).

230. 28 U.S.C. § 2412(d)(2)(H) (1994).

231. 31 F. Supp. 2d 542 (N.D. W. Va. 1998).

232. *Id.* at 544. In *United States v. Chan*, 22 F. Supp. 2d 1123 (D. Haw. 1998), the district court relied on the Hyde Amendment as an alternative to the EAJA in awarding attorney's fees to a claimant seeking restitution that had been ordered in a criminal case, which the government refused to pay. *Id.* at 1127 n.3. A claim against the government seeking payment of funds turned over by a defendant to the government is clearly a civil action, not a "criminal case," and therefore subject to the EAJA. *Id.* at 1127. The basis on which the funds were transferred, (i.e., restitution in a criminal prosecution) is irrelevant to the status of the claim as a civil action, not a criminal case. *Id.* Moreover, the Hyde Amendment provides a vindicated defendant, not a third-party claimant, with a means to recover attorney's fees incurred in the prior criminal prosecution; therefore, claims under the act should not be available in forfeiture actions.

233. 31 F. Supp. 2d at 543-44.

234. 350 U.S. 359 (1956).

235. *Id.*

government program bribery,[240] and tax evasion.[241] These are the types of cases in which the prosecutor plays the leading role through the use of the grand jury's investigative authority. Importantly, the Hyde Amendment prohibits defendants represented by appointed counsel from filing claims for attorney's fees.[242] Because appointed counsel typically represent defendants involved in street crimes, the beneficiaries of the Hyde Amendment are more likely to be vindicated defendants in white collar cases.[243] It should not be surprising, then, that the grand jury phase of the case has been a major subject of judicial review in Hyde Amendment claims for attorney's fees.

The Hyde Amendment was the product of rather hasty congressional action, adopted as a floor amendment with no hearings by either chamber of Congress. Its final form was a compromise, with little discussion of the scope

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240. United States v. Reyes, 16 F. Supp. 2d 759 (S.D. Tex. 1998).

241. United States v. Gardner, 23 F. Supp. 2d 1283 (N.D. Okla. 1998).

242. Hyde Amendment §617, 111 Stat. at 2519.

243. Professor Richman suggests that the grand jury secrecy provision in FED. R. CRIM. P. 6(e), which prohibits prosecutors from disclosing any matter occurring before the grand jury, primarily benefits the targets of white collar investigations because that is the type of case likely to involve significant grand jury involvement in the investigative phase. *See* Richman, *supra* note 35, at 344-45. In considering the effect of Rule 6(e), he notes:

> Does it make sense to have a system that in effect shows a special solicitude for targets and witnesses in white collar cases? Aren't these, in fact, the cases where, in the face of efforts by well-financed lawyers to impede information collection, the government is most in need of options that might include the selective dissemination of investigative data? One can also argue that the need for prosecutors to defend an investigation to the public while it is on-going is likely to be greater in white-collar [crimes] than in other contexts. After all, white collar targets are far better able to marshal support in the press and elsewhere than other targets—support that may impede the progress of an investigation and/or sway the potential jury pool.

Id. at 355.

The Hyde Amendment is different from Rule 6(e)'s disclosure prohibition in that it is a postverdict claim, while a violation of the Rule can trigger an investigation of the prosecutor before trial, or even before the grand jury considers an indictment. Yet, both Rule 6(e) and the Hyde Amendment, while not specifically limited to white collar cases, are most likely to arise in that type of case because those are the instances in which the grand jury's investigative function will be employed, and the prosecutor will lead the investigation. In his statement on the floor of the House of Representatives, Representative Hyde asked, "I really wish you had some imagination and could imagine yourself getting arrested, getting indicted, what happens to your name, to your family, and the Government has a case it cannot substantially justify." 143 CONG. REC. H7793 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde). The imaginary victim of government misconduct portrayed by Representative Hyde seems to be a member of the middle-class, probably a professional, who is unfairly charged with a crime that does not involve drugs or violence, but a white collar crime such as tax evasion, illegal campaign contributions, or the like. That person is the likely recipient of the Hyde Amendment's new claim for attorney's fees.

of the provision or the types of conduct it meant to reach. While not a model of reflective legislation, the Hyde Amendment is largely successful in creating a procedure for courts to review prosecutorial misconduct consistent with protecting the investigative function of the grand jury. Congress clearly had in mind misconduct during all phases of a criminal case, including the investigation, when assessing whether the government's position was vexatious, frivolous, or in bad faith. By authorizing a limited form of judicial review, the Hyde Amendment is consonant with the Supreme Court's approach to prosecutorial misconduct that rejects contemporaneous review during the pendency of the criminal proceeding.

Giving courts the clear authority to assess the propriety of the prosecutor's conduct overcomes the problem with the judicial exercise of the supervisory power, which has permitted judges to allow their personal views to interfere with the prosecutor's conduct of a grand jury investigation. By making prosecutorial misconduct the focal point of the review, Congress allows courts to exercise a limited measure of judicial review of the grand jury investigation, among other issues, but limits that review to a *post hoc* assessment of the entire case. The Hyde Amendment is consistent with, and indeed supports, the Supreme Court's approach that limits the authority of courts to inject themselves into an investigation while still retaining some residual authority to exercise the power to review the government's conduct at the end of the proceeding.

B. The McDade Act

A second legislative initiative to address prosecutorial misconduct is the McDade Act. It makes federal prosecutors "subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."[244] The provision is named for Representative Joseph McDade, who was acquitted of federal criminal charges related to campaign contributions. While his plight was the impetus for the Hyde Amendment, Representative McDade proposed legislation even before his acquittal to more closely regulate prosecutors.[245]

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244. Pub. L. No. 105-277, § 801, 112 Stat. 2681 (1998) (to be codified at 28 U.S.C. § 530B). In the federal code, the title of this provision is "Ethical Standards for Federal Prosecutors," although the statute only incorporates the provisions of state ethical codes and does not provide a separate set of duties for federal prosecutors.

245. Representative McDade first introduced a bill to make federal prosecutors subject to state ethical rules in the Ethical Standards for Federal Prosecutors Act of 1996. H.R. 3386, 104th Cong. (1996). He introduced the following two bills in the next Congress: (1) Ethical Standards for Federal Prosecutors Act of 1997, H.R. 232, 105th Cong., and (2) Citizens Protection Act of 1998, H.R. 3396, 105th Cong. The latter proposal passed as an amendment to the Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, § 801, 112 Stat. 2681 (1998) (to be codified at 28 U.S.C. § 530B).

Representative McDade's proposal contained a list of actions that would subject a federal prosecutor to disciplinary action and would have established a Misconduct Review Board with the authority to issue subpoenas to investigate allegations of prosecutorial misconduct.[246] Although the House of Representatives passed the bill, much like the Hyde Amendment, it was attached to a broader spending bill sent to the Senate. A compromise version of the statute that emerged from a Conference Committee, which Congress approved, substantially modified the original proposal.[247] Congress eliminated virtually all of the regulatory provisions except for making federal prosecutors subject to the disciplinary rules of the states. The McDade Act is similar to the Hyde Amendment in other ways: congressional committees never held hearings to consider either proposal; the floor debates on both laws dealt only with earlier versions of the bill, so their relevance is questionable in interpreting the statutes; and both were passed as amendments to other legislation, so congressional consideration of the provisions was minimal. These laws, with scant legislative history on the provisions as finally adopted by Congress, share their origin in the congressional pique over the perceived mistreatment of Representative McDade at the hands of federal prosecutors.[248]

However, the McDade Act also arose in a broader context involving the application of state ethical rules to federal prosecutors, an issue that had been brewing for almost ten years. In 1989, responding to concerns expressed by federal prosecutors about the application of state ethics rules to them, Attorney General Richard Thornburgh adopted a new policy embodied in a document known as the "Thornburgh Memorandum." The policy purported to exempt Department of Justice attorneys from state ethical rules that limited contacts with persons represented by counsel, at least before the grand jury returned an indictment.[249] The Thornburgh Memorandum sought to counter efforts by defense lawyers to limit contacts with their clients by prosecutors and investigators, especially in undercover operations, by invoking state ethical rules that prohibit a lawyer from communicating "with a party he knows to be

246. H.R. 3396.

247. The House of Representatives incorporated the McDade Act into an appropriations act. H.R. 4276, 105th Cong. § 811(a) (1998); *see* 144 CONG. REC. H7227 (1998).

248. The Supreme Court recognized in United States v. Brewer, 408 U.S. 501 (1972), that prosecutorial overreaching can have "serious practical consequences when the defendant is a Congressman. The Legislative Branch is not without weapons of its own and would no doubt use them if it thought the Executive were unjustly harassing one of its members." *Id.* at 523 n. 16. The two provisions adopted by Congress in response to the prosecution of Representative McDade are quite mild–providing only vindicated defendants with a claim for attorney's fees and subjecting prosecutors to no more onerous rules than those that govern the entire legal profession–when compared to more punitive measures it might have adopted, such as substantial budget cuts.

249. Memorandum to All Justice Department Litigators re Communications with Persons Represented by Counsel, *reprinted in In re* Doe, 801 F. Supp. 478, 489-93 (D.N.M. 1992).

represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party . . . ."[250] Needless to say, the response to a policy that exempted federal prosecutors from the ethical rules of the profession drew severe criticism.[251] Six years later, Attorney General Janet Reno promulgated a rule to codify the obligations and rights of federal prosecutors in dealing with persons represented by counsel, modifying the scope of the Thornburgh Memorandum but, importantly, not abandoning the basic approach of relieving government attorneys from the limitations of the rules of the profession adopted by the states.[252] Regardless of the strength of the Department of Justice's arguments in favor of protecting its attorneys, the visceral reaction to a policy that exempts a group of lawyers from the profession's ethical rules was quite naturally one of suspicion and mistrust. The backlash against the Department of Justice came in the McDade Act.[253]

The McDade Act does not provide defendants with a procedure to rectify a particular instance of prosecutorial misconduct, unlike the Hyde Amendment. Instead, it subjects prosecutors to ethical provisions that may trigger disciplinary sanctions if they engage in misconduct. There is no dispute that prosecutors are the same as every other lawyer, and indeed operate under a higher calling, pronounced by the Supreme Court as a duty to ensure justice.[254] The Author has argued elsewhere that disciplinary proceedings are a good means to police prosecutorial misconduct because the evaluation of the government attorney's actions occurs outside the context of the underlying criminal prosecution in which they took place. The disciplinary process is broader than a constitutional evaluation of the prosecutor's conduct, taking into consideration the good of the profession and the interests of society in the fair

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250. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104 (1980). The Model Rules contain a similar restriction. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1992).

251. *See, e.g, In re* Doe, 801 F. Supp. at 486 (stating that this policy "displays an arrogant disregard for and irresponsibly undermines ethics in the legal profession"); Am. Bar Ass'n Report to the House of Delegates (Feb. 12, 1990) ("[This policy is] an unwarranted and unfounded use of executive power to create unequal classes of both litigants and lawyers.").

252. 28 C.F.R. § 77 (1998). For a thorough review of the rules and the history of the debate over exempting federal prosecutors from state ethical rules, *see* Frank O. Bowman, III, *A Bludgeon by Any Other Name: The Misuse of "Ethical Rules" Against Prosecutors to Control the Law of the State*, 9 GEO. J. LEGAL ETHICS 665, 721-53 (1996); Jennifer Marie Buettner, *Compromising Professionalism: The Justice Department's Anti-Contact Rule*, 23 J. LEGAL PROF. 121, 128-131 (1999).

253. The provision did not become effective until April 19, 1999, six months after passage of the McDade Act. Senator Hatch introduced legislation prior to the effective date to amend the provision by exempting federal prosecutors from state ethical rules "to the extent that the State law or rule is inconsistent with Federal law or interferes with the effectuation of Federal law or policy, including the investigation of violations of Federal law," but the bill did not pass the Senate. *See* S. 250, 106th Cong. § 2(a)(1) (1999). Even before the adoption of the McDade Act, the Eighth Circuit struck down the Department of Justice rules on the ground that it did not have the authority to promulgate them. United States *ex rel* O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252, 1256-57 (8th Cir. 1998).

254. *See* Berger v. United States, 295 U.S. 78, 88 (1935).

administration of justice. Unlike judicial review of prosecutorial misconduct, which must consider prejudice to the defendant, the state bar authorities can look at the entire course of the proceeding to determine whether the prosecutor met the ethical standards without regard to whether the conduct harmed the defendant.[255] To the extent the McDade Act shows a congressional intent to encourage the use of the disciplinary process to police prosecutorial misconduct, it is a positive development.

The problem with imposing the state rules on federal prosecutors is that disciplinary proceedings are not limited to the type of *post hoc* review of the prosecution that the Hyde Amendment adopted. A complaint against a prosecutor can be filed at any time, rather than being restricted to post-trial proceedings whose objective is to safeguard the profession and the public. An allegation of an ethical violation could be used as a strategic tool by an unscrupulous defense counsel seeking to distract the prosecutor from pursuing a case. The threat of having to defend oneself in a disciplinary proceeding can have a deterrent effect, regardless of the validity of the alleged violation. For a federal prosecutor, that problem is compounded by the McDade Act's requirement that the rules of the state in which the attorney operates, and not the state in which the person is licensed, govern the conduct at issue. In federal investigations, actions may be brought in a number of jurisdictions, potentially subjecting the prosecutor to multiple disciplinary proceedings.

Beyond the potential use of an ethical complaint as a tactical device, the rules themselves may be in conflict. What is permissible in one jurisdiction may be a violation in another. Moreover, the attorney is responsible not only for her own actions, but also those over whom she has control, such as the investigatory agents that conduct interviews and engage in undercover operations.[256] The possibility of a violation, or at least action that could give rise to a complaint to the disciplinary authorities, is multiplied when the attorney can be held responsible for the conduct of agents. Of course, there is nothing wrong with holding an attorney liable for conduct by others, but the threat to federal prosecutors is magnified given the breadth of certain types of complex investigations.

Perhaps the greatest problem with the McDade Act is the lack of uniformity in ethical rules for the profession. The rules are a product of the interaction of different groups, usually consisting of the courts, legislatures, and bar associations, both national and local.[257] The American Bar Association has been quite influential in the development of ethical codes through its adoption of the Model Code of Professional Responsibility and, more recently, the

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255. *See* Henning, *supra* note 123, at 471-75.

256. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.3(b) (1992) ("[A] lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.").

257. *See* STEPHEN J. GILLERS, THE REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 1-9 (3d ed. 1992).

Model Rules of Professional Conduct; the American Law Institute has weighed in with its Restatement of the Law Governing Lawyers. However, this process of divining Platonic ideals is one subject to a certain degree of lobbying and political pressure.

Can rules be adopted—perhaps the process even manipulated—to provide defendants with protections that they could not achieve through the legislative process or have been denied by judicial interpretations of constitutional or statutory rights? Until 1995, Model Rule 3.8(f)(2) required that a prosecutor not subpoena a lawyer in a grand jury investigation without receiving prior judicial approval.[258] While a split existed about whether a state rule could impose such a duty under the Supremacy Clause,[259] the McDade Act would permit a state to impose a notification requirement on federal prosecutors even though Congress had not acted, and a federal court could not impose such a procedure under its supervisory power. That the ethical rules can be changed to expand the rights of individuals under the guise of regulating the conduct of lawyers was demonstrated when the American Bar Association responded to the Thornburgh Memorandum by expanding the language of Model Rule 4.2 to prohibit contacts with any represented "person" and not just a "party" to litigation.[260] This expansion of the Model Rule created a means to impede an investigation by changing the guideline under which the prosecutor must operate.

It would be odd to have the ethical rules of the profession become the vehicle for granting rights that are not mandated by the Constitution or adopted by the legislature; that federal officers would have the rules created by fifty-one different jurisdictions is perhaps odder still. Not to overstate the case—or to argue that the process of adopting ethical rules is a captive of special interests—the problem is that the McDade Act makes no provision for federal review of the rules, or even a means by which the federal interest can be represented in the state process. The filing of a complaint with the disciplinary authorities is very serious business, and the potential for abuse is enough to raise a question whether the wholesale approach of the McDade Act is the best method of addressing prosecutorial misconduct. Unfortunately, Congress did not pause to consider these issues, adopting the provision without the benefit of much, if any, reflection. The adage "act in haste, repent in leisure" comes to mind, and one should consider whether the visceral reaction embodied in the McDade Act will serve the goal of policing prosecutorial misconduct without also giving defendants a tool to obstruct legitimate law enforcement activities.

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258. MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.8(f)(2) (1992).

259. *Compare* Whitehouse v. United States Dist. Court, 53 F.3d 1349, 1357-59 (1st Cir. 1995), *with* Baylson v. Disciplinary Bd., 975 F.2d 102, 111-12 (3d Cir. 1992).

260. *See* Buettner, *supra* note 252, at 125 (describing amendment of Model Rule 4.2 by ABA in response to Department of Justice policy on contacts with represented persons).

V. CONCLUSION

The fact that the prosecutor's conduct in a grand jury falls beyond a federal court's power of review is the result of the Supreme Court's desire to insulate the investigatory function of the grand jury. A court cannot consider an allegation of prosecutorial misconduct without inquiring into the nature and course of the grand jury's investigation; judicial review of one necessitates inquiry into the performance of the other. By restricting the supervisory authority of federal courts to inquire into the grand jury's investigation and placing it beyond the constitutional limitations on investigations, the Court makes charges of prosecutorial misconduct unreviewable, at least in the proceeding in which the alleged misconduct takes place. This construction is not the result of a mistaken view of the grand jury's role, or a misinterpretation of the meaning of the Court's decisions. In fact, the Court has made protection of the grand jury's investigative function, and the concomitant elimination of judicial review of prosecutorial misconduct, the rationale for its approach to challenges to the grand jury. Unless the body itself is illegally constituted, its investigations and accusations are unassailable—not because they are necessarily right, but because the cost of judicial review would be too great.

Insulating prosecutors' conduct in the grand jury from direct judicial review does not mean they are, or should be, unaccountable. Prosecutors must be held accountable, but the best means of reviewing their conduct is outside the criminal proceeding in which it takes place. Contemporaneous review of a charge of misconduct can make the entire criminal prosecution depend upon whether the government's attorney acted properly, and the prosecutor will have a powerful incentive to protect the charges, perhaps at the cost of being less than honest about motives. Rather than commingle the criminal charges with allegations of misconduct, claims of improper action by a prosecutor should be left to a separate proceeding. The Hyde Amendment and McDade Act take that approach by trying to provide a means to redress misconduct in a proceeding that will make the prosecutor's actions the focal point without calling into question the underlying criminal proceeding. Whether those laws succeed is a question that will have to be answered over time as courts work through the flaws inherent in any legislation adopted after only limited congressional consideration. However, what Congress has done at least begins to address the gap left by the Supreme Court and, ultimately, the Constitution, that permits the grand jury—and prosecutors—virtually unfettered power to investigate possible criminal activity.